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E

REPORTS

OF

CASES DECIDED

BY THE

ENGLISH COURTS,

WITH

NOTES AND REFERENCES TO KINDRED CASES AND AUTHORITIES.

BY

NATHANIEL C. MOAK,

Counsellor at Law.

VOLUME XVIII.

CONTAINING

1 APPEAL CASES, pp. 713-800.
3 CHANCERY DIVISION, pp. 209-836.
1 COMMON PLEAS DIVISION, pp. 533-790.
1 EXCHEQUER DIVISION, pp. 336-510.
1 PROBATE DIVISION, pp. 292-431.
1 QUEEN'S BENCH DIVISION, pp. 613-748.

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Right Hon. Sir HENRY COTTON,[3]	"	1877.
Right Hon. Sir ALFRED HENRY THESIGER,[4]	"	"

[1] Died June 16, 1877: 12 Law Jour., 372.
[2] Retired on account of ill health October, 1877: 63 L. T., 417.
[3] Appointed June, 1877, in place of Lord Justice MELLISH: 12 Law Jour., 386.
[4] Appointed Nov., 1877, in place of Lord Justice AMPHLETT: 12 Law Jour., 631.

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CHIEF JUDGE IN BANKRUPTCY.

Hon. Sir JAMES BACON, Vice-Chancellor.

JUDGE OF THE COURT OF ARCHES.

LORD PENZANCE, appointed 1875.

[1] Appointed April 30, under the act of April 24, 1877: 12 Law Jour., 251.

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APPEAL CASES

BEFORE THE

HOUSE OF LORDS

AND THE

JUDICIAL COMMITTEE

AND

LORDS OF HER MAJESTY'S MOST HONORABLE

PRIVY COUNCIL.

[1 Appeal Cases, 713.]

H.L. (E.), June 26, 29; July, 3, 27, 1876.

[HOUSE OF LORDS.]

*JOHN ANDERSON, Appellant; and JAMES FARQUHAR MORICE, Respondent (1). [713

ET E CONTRÀ.

"Cargo"—Insurance—Insurable Interest—Property passed—Costs.

The purchaser of a "cargo" of rice which is to be loaded on board a ship expected to arrive at a certain port, where it is to load for a voyage, he agreeing to pay a sum certain "per cwt., cost and freight," has no insurable interest in the purchase (*diss.* Lord O'Hagan and Lord Selborne), so that should the rice put on board be lost before the loading is completed, he cannot recover on a policy of insurance effected on goods in the vessel.

A. was a merchant in London, he entered into a contract for the purchase of rice. The contract consisted of a bought note, which was in the following terms: "Bought for the account of A., of B. S. & Co., the cargo of new crop Rangoon rice, per Sunbeam, 707 tons register, at 9*s.* 1½*d.* per cwt., cost and freight. Payment by sellers' draft on purchaser at six months' sight, with documents attached." A. insured the cargo "at and from Rangoon." The ship arrived at Rangoon in due time. The loading, by bags, of the rice, was rapidly proceeded with; by far the larger portion of the cargo was on board, the remaining bags of rice being in lighters alongside, when the vessel, unexpectedly, sank. The captain afterwards signed and delivered bills of lading, and the purchaser then accepted the seller's drafts, which were duly honored. In an action as for a total loss, the Court of Common Pleas held that A. was entitled to recover. The Exchequer Chamber (*diss.* Quain, J.) reversed this decision on the ground that A. had no insurable interest when the loss occurred.

(1) Affirming 14 Eng. R., 455; reversing 11 Eng. R., 252.

On appeal to this House, the Lords were equally divided, and so the judgment of the Exchequer Chamber stood affirmed. No costs were given on the affirmance.

The jury had found, in favor of A., that there was a loss by the perils insured against. This finding was adopted in both courts. On appeal that decision was affirmed with costs.

THIS was an appeal against a decision of the Court of Exchequer Chamber, which, by a majority of five judges to one, had reversed a previous decision given unanimously by three judges in the Court of Common Pleas.

The action was brought to recover as for a total loss on a policy of insurance effected on rice in the ship Sunbeam, at and from Rangoon to any port in the United Kingdom. Policy valued at £5,500.

714] *The first count of the declaration was on the policy. There were also the common money counts. Pleas: 1, denial of the insurance; 2, that the rice was not loaded on board; 3, denial of plaintiff's interest; 4, unseaworthiness; 5, denial of the loss by perils insured against. As to the money counts, payment into court. Issue.

The cause was tried in London, at the sittings after Hilary Term, 1873, before Mr. Justice Brett.

The plaintiff was a merchant in London, the defendant an underwriter at Lloyd's. On the 21st of February, 1871, Mr. Anderson had a dealing with Barradaile, Schiller & Co., respecting a cargo of rice, and the following note was then executed:

"Bought for account of Messrs. John Anderson & Co., of Messrs. Barradaile, Schiller & Co., the cargo of a new crop Rangoon rice, per Sunbeam, 710 register, No. 1,254 in Veritas, at nine shillings and one penny halfpenny (9*s.* 1½*d.*) per cwt., cost and freight, expected to be March shipment, but contract to be void should vessel not arrive at Rangoon before April, 1871. Payment by sellers' draft on purchaser at 6 months' sight, with documents attached. Brokerage ½ per cent.

"Thomas Gray & Walker."

The Sunbeam arrived at Rangoon on the 3d of March, and began loading on the 6th. On the 7th of March the agents of the vendors sent to Anderson a letter stating that they had received a telegram from their principals at Calcutta in these words, "Sunbeam—Rangoon—advise Anderson—Insurance."

On the 3d of February the insurance had already been effected, as "at and from Rangoon to any port or place of discharge in the United Kingdom or Continent by the Sunbeam, warranted to sail from Rangoon on or before the 1st

of April, upon any kind of goods and merchandise; beginning the adventure upon the said goods, &c., from the loading thereof aboard the said ship, &c., and shall so continue and endure during her abode there, &c. And farther, until the said ship, with all goods, &c., shall be arrived as above, &c., the said ship and goods, &c., are and shall be valued at £5,500 (part of £6,000) on rice as interest may appear. Amount of invoice and 15*s.* to be deemed the value average payable on every *500 bags. Assurance at and after [715 the rate of nine guineas per cent.; return of 40*s.* on vessel's discharge in United Kingdom."

The vessel did not belong to any of the contracting parties, but was at the time the property of an American firm, and had been chartered by Messrs. Gerber, of Rangoon, to take a cargo of rice from that place to the United Kingdom. Messrs. Barradaile had purchased their interest. In March, 1869, the Sunbeam, being at New York, was recaulked and remetalled in dry dock (though not then surveyed), and was reclassed in the French Veritas for three years from that time. It proceeded on a voyage to the Chincha Islands, and sailed in September, 1869, with guano for London, where it arrived in June, 1870. It then proceeded to Cardiff, and took in a cargo of coals for Point de Galle. It duly arrived there and delivered the coals. It was then chartered by Gerber & Co., of Rangoon, to load a cargo of rice there for a port in the United Kingdom or the Continent, the charter providing a gratuity of £20 to the captain in case he completed the loading of the rice before the 1st of April. The Sunbeam left Point de Galle in ballast, and arrived at Rangoon on 3d of March, 1871. The weather was very dry and hot, and the ship, being in ballast, was very light, and the upper sides were out of the water.

On arriving at Rangoon the Sunbeam anchored at the usual anchorage in the Pegu river, where that stream joins the Rangoon river, about five miles below the town of Rangoon, and about thirty miles from the sea. The Pegu has a very rapid rise and fall of the tide. The sides and bottom of the river are of soft mud to the depth of several feet, and the depth of the stream at low water is twenty-six or twenty-seven feet. The Sunbeam was anchored by the bows with its starboard and port anchors, each with thirty fathoms of chains, the one being up and the other down the stream, at a distance of sixty fathoms; the vessel swung with the tide, and rode by one or the other anchor as the tide ebbed and flowed.

On the 6th of March the Sunbeam began to receive the

rice on board. The loading went on rapidly, and, on the 30th of March, the ship had received the greatest part of the cargo; 8,878 bags of rice had been loaded, the others were in lighters alongside. Up to six o'clock in the afternoon of the 30th of March nothing wrong was suspected, but 716] something then was observed; the trim of the *vessel was sought to be altered, the pumps were set to work, and it was found that there were six feet of water in the hold. Notwithstanding great exertions at the pumps, the water had by ten o'clock p.m. increased to twelve feet. The water kept gaining on the pumps, and between eight and nine on the morning of the 31st of March the ship and cargo sank and became a total loss.

On the 3d of April, 1871, the captain signed bills of lading in respect of the rice which had been shipped on board. The bills of lading were in the following terms: "Shipped in good order and condition by Gerber, Christian & Co., in and upon the good ship called the Sunbeam, whereof J. H. Bennett is master, for the present voyage, bound for, &c., 8,878 bags containing 28,841 baskets new Rangoon cargo rice, being marked and numbered as in the margin, and are to be delivered in like good order and condition at the port as ordered, at Falmouth or Cork (the act of God, the Queen's enemies, fire, and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever always excepted), unto order, freight for the said goods at the rate of £3 15*s.* 0*d.* (three pounds and fifteen shillings) sterling per ton of 20 cwt. net delivered. In witness whereof, &c. Weight and contents unknown. J. H. Bennett." Messrs. Barradaile & Co. drew bills for the price of the rice mentioned in these bills of lading, and these bills of exchange were accepted and paid by the plaintiff Anderson after he had notice of the sinking of the vessel and the rice.

At the trial there was contradictory evidence as to the loss having occurred from the unseaworthiness of the vessel, or from the perils insured against, upon which question the jury ultimately found a verdict for the plaintiff. Another point raised by the defendant's counsel was that, under the circumstances existing here, the plaintiff had no insurable interest in the cargo. The verdict was entered for the plaintiff subject to leave reserved to move on these points. A rule was accordingly obtained, but, on the 2d of November, 1874, was discharged (1). The case was taken by appeal before the Exchequer Chamber, where, on the 26th of June,

(1) Law Rep., 10 C. P., 58.

1875, judgment was given unanimously that there was evidence to sustain the verdict; that the loss was occasioned *by perils insured against, and that there was not [717 evidence to show that the ship was unseaworthy, but (*diss.* Mr. Justice Quain) that the plaintiff had no insurable interest in the rice at the time of the loss, and therefore the judgment of the Court of Common Pleas was reversed (').

This appeal was then brought.

There was also a cross appeal. It was brought by Morice against the decision of the Exchequer Chamber so far as it had affirmed the judgment of the Common Pleas, sustaining the finding of the jury that the loss had happened from the perils insured against.

Sir *H. James*, Q.C., and Mr. *Watkin Williams*, Q.C. (Mr. *J. C. Mathew* with them), for the appellant: Immediately upon the execution of the contract for the purchase of the rice, the appellant (the plaintiff below) obtained an insurable interest in it. The contract gave him that interest (²), and the conduct of the parties showed that in their understanding the rice was his property. On the construction of the contract the whole case depends. The words of the contract showed that the vendor had no other duty to perform than to deliver the rice, and that all the responsibility of insuring it rested with the purchaser. The risk was therefore his. Even the policy described the risk as beginning with the loading of the cargo. From the moment that any part of it came into his possession, the appropriation of it by the vendor was complete; from the moment the vendee received it on board his adoption of that appropriation was declared, and his risk began. Till it was delivered, it might possibly be said that it still remained the property of the vendor, but the very instant that any part of it was put on board Mr. Anderson's ship, that instant the delivery of that part was complete, and the property in it vested in him. He might have made a contract over, and would have been liable upon it. If the part put on board had been destroyed by fire, the loss would have been that of the purchaser. And if the vendors had, after that, brought a farther quantity to be put on board, so as to complete the cargo, the master must have accepted it. The ship, for this purpose, was Anderson's; it was the warehouse within which his goods (the rice) *were by him appointed [718 to be stored, and his hiring of the vessel was the same as would have been his hiring of a warehouse on shore for the purpose of receiving his goods. It was the same thing

(') Law Rep., 10 C. P., 609. (²) Phillips on Insurance, c. iii, 178.

whether the goods were to be delivered to the purchaser himself, or to a wharfinger whom the purchaser had specially appointed to receive them. It need not be shown that the purchaser was bound, from the first, to take the goods; if he had the right to take them, and by his conduct showed that he had exercised that right, they became his. He could exercise his right of option at any time, and he might exercise it as each portion came on board. The vendors could not have entered his ship to take away any portion of the delivered cargo. It made no difference that his payment for these goods was not to be made till the bills of lading and shipping documents were delivered; that was a mere delay in the time of making the payment, which did not affect his right or his liability. Payment for goods is not the only test of the goods having become the property of a purchaser. The only thing that could have released him from liability would have been the non-performance of the contract on the part of the vendors, and in that event he might have had an option to reject what had been sent, but the delivery of each bag of rice sent was, so far, a part performance of the contract by the vendor, and the acceptance of each bag of rice was, so far, an exercise of Anderson's option. The whole could not be put on board at once, and what was put on board and received on board became his property from that moment.

The insurance attached from the arrival of the Sunbeam in the river at Rangoon, and the risk then began.

Such was clearly the intention of the parties on entering into the contract, and the appellant showed the *bona fides* of that intention by at once insuring the rice. If the purchaser had a right to say to the seller, "I accept the rice sent me," he had equally the right to say to the underwriter, "I have accepted it, and it is my property, to cover which the policy has been executed." The insurance attached the moment the goods were on board; there was no waiting till the ship had got out to sea on the voyage. The words of the policy, "at Rangoon," show that it was to attach during the loading on board.

Even though the whole property has not been actually 719] delivered, *the risk of it may be that of the purchaser: *Martineau* v. *Kitching* (1).

This was not the purchase of an ascertained chattel, but of a cargo of rice, of rice to be delivered in bags, and each delivery of each bag was therefore, so far, a fulfilment of the

(1) Law Rep., 7 Q. B., 436.

contract, and the interest attached as that was done: Arnould on Marine Insurance (1); *Turley* v. *Bates* (2).

Sparkes v. *Marshall* (3), *Castle* v. *Playford* (4), *Joyce* v. *Swann* (5), *Langton* v. *Higgins* (6), *Seagrave* v. *The Union Marine Insurance Co.* (7), *Aldridge* v. *Johnson* (8), *Ebsworth* v. *The Alliance Marine Insurance Co.* (9), *Byrne* v. *Schiller* (10), *Hicks* v. *Shield* (11), *Mansfield* v. *Maitland* (12), *Lucena* v. *Craufurd* (13), *Hagedorn* v. *Oliverson* (14), *Cory* v. *Patton* (15), and *Carter* v. *Scargill* (16), were also cited and commented on.

Mr. *Butt*, Q.C., and Mr. *Cohen*, Q.C., for the respondent: Insurance is a contract for indemnity—nothing more, and unless a person has an interest against the loss of which he requires to be indemnified, he cannot insure. Here there was no such risk. The loss, if any, occurred at the moment the ship sank. Could it be said that the appellant had then lost anything? Certainly not. He had then no property in the goods—none had passed to him—the property was in the vendors; they had untertaken to deliver a "cargo" of rice. At the moment the ship went down, no cargo had been delivered—the vendors were only in the course of performing their contract, and, till they had performed it, the rice was at their risk. There was an act to be done by the vendors, and till done, there had been no performance of the contract, and no property passed: Blackburn, Contracts of Sale (17). *The vesting of the [720 property is a question of intention, and the contract does not show that there was any intention that the property should pass until the delivery of the cargo had been completed, nor perhaps, indeed, until the bill of lading and the shipping documents had been delivered, and the drafts in payment had been accepted. Now if only a few bags had been put on board, it could not be contended that the purchaser would have been bound to accept them as delivery of the cargo, and no difference in principle was made by the fact that instead of a few bags a great many bags of rice had been put on board. The plaintiff was entitled to exercise an option as to what was sent in performance of the contract,

(1) C. x., p. 239, *et. seq.*
(2) 2 H. & C., 200.
(3) 2 Bing. N. C., 761.
(4) Law Rep., 7 Ex., 98.
(5) 17 C. B. (N.S.), 84.
(6) 4 H. & N., 402.
(7) Law Rep., 1 C. P., 305.
(8) 7 El. & Bl., 885.
(9) Law Rep., 8 C. P., 596.
(10) Law Rep., 6 Ex., 20–319. See *Allison* v. *Bristol Marine Insurance Company*, 1 App. Cas., 209.
(11) 7 El. & Bl., 633.
(12) 4 B. & A., 582.
(13) 3 B. & P., 75; 2 N. R., 269. See also 1 Taunt., 325.
(14) 2 M. & S., 485.
(15) Law Rep., 7 Q. B., 304.
(16) Law Rep., 10 Q. B., 564.
(17) Page 151.

and to exercise it up to the last moment of the delivery of a full cargo. But if so, till that full cargo had been delivered, and had been accepted, the property was not his, but that of the vendor, and was consequently not at the purchaser's risk: *Appleby* v. *Myers* (1). The case of *Gilmour* v. *Supple* (2) had been relied on in the court below, but that was not a case of insurance, but merely one of a contest between vendor and vendee, in which the rights of third persons were not affected.

The delivery here could not be said to be made into the ship of the appellant: it was not his, he had not chartered it; he arranged with the vendors of the rice that they should put the rice on board that ship, and he was to pay a gross sum to the vendors of the rice, which was to cover the value of the rice and the sum which the vendors were to pay for the freight. The property could not be said to be delivered to him till it was delivered into his ship. There was a broad distinction between delivery of goods into his own ship and delivery of them into a ship merely chartered by another person for a voyage, and the freight for which was to be paid as part of the gross purchase-money of the cargo. That distinction was made clear by all the cases which related to stoppage *in transitu*, where delivery into a chartered ship, or to a railway company was not, as of course, deemed delivery to the vendee himself, but all the circumstances of the delivery were required to be considered. Putting the rice on board a ship which was at the time more the ship of the vendors than it was the ship of the plain-
721] tiff, was not like putting the oil *agreed to be sold into bottles furnished for that purpose by the purchaser himself, as in the case of *Langton* v. *Higgins* (3), and did not constitute an appropriation of the rice to Anderson. How then, if the property in the rice did not pass to the plaintiff, could he be said to have an insurable interest in it? The rice might be his by contract, so far as he and the vendors were concerned, so as to enable him to sue on the contract, but their mutual relation in that respect would not be sufficient to affect the rights and liabilities of third persons. The property here did not pass; the bill of lading had not been delivered, but was to be handed over at a future time. Before that time arrived, and when no property was vested in him, and no risk cast upon him, the plaintiff insured the cargo. But if he had no right in the cargo, and no interest in it, and no risk attached to it, the mere act of insurance could not give him one. Reliance was placed on

(1) Law Rep., 2 C. P., 651. (2) 11 Moo. P. C., 551. (3) 4 H & N., 402.

the words of the contract; it was assumed that, without express words to pass the property it would pass and be at the risk of the buyer, on account of the implied effect of some words in the contract. Thus it was supposed that the words "bought" and "cost and freight" were sufficient to show that the whole property in the subject-matter of the contract was in the buyer; but that was not so. The word "bought" was merely a common phrase used to show that a dealing with respect to purchase and sale had taken place, but it did not show that there had been a complete sale sufficient to pass the property; and the other words merely described what would be the amount of liability, and in what way that was to be measured, when the contract was actually carried into effect. But it is essential to show that the insured had actually an interest at risk: Phillips on Insurance (1); *Warder* v. *Horton* (2). The risk went with the property. The act of insuring, immediately after the contract was made, had no effect whatever in showing that that contract was to be taken as executed. The vendor's risk never began until after the day when the cargo which was the specific subject of purchase had been delivered, but none was ever delivered, for the ship sank before the delivery was complete. The words of the policy, therefore, *had here no application favorable to the plaintiff, [722 for they related not to a liability for part of a cargo, but for a cargo—a complete cargo. In *Sparkes* v. *Marshall* (3) and *Joyce* v. *Swann* (4) the court thought that the property had passed, but as that was the very question here, those cases were inapplicable to the present. The principle by which all cases of this kind must be decided was laid down in *Cutter* v. *Powell* (5), and was fully elucidated in the learned notes to that case printed in Smith's Leading Cases (6). When this ship went down there was no liability on the part of the plaintiff to pay for anything. If so, there was no interest in him of an insurable nature.

Sir *H. James* replied.

LORD CHELMSFORD: My Lords, the question to be determined upon this appeal is one of some difficulty, and it has given rise to a great diversity of judicial opinion. It may be thus shortly stated: whether the appellant under a contract for the purchase of a cargo of rice, to be shipped in a vessel called the Sunbeam, had any property in the rice, or had incurred any risk in respect of it, so as to give him an

(1) Chap. iii, sects. 172, 175, 181, 185.
(2) 4 Binney, Pensylv. Rep., 529.
(3) 2 Bing. N. C., 761.
(4) 17 C. B. (N.S.), 84.
(5) 6 T. R., 320.
(6) Vol. ii, p. 1.

insurable interest at the time of the total loss of the vessel and cargo?

The contract for the purchase of the rice is in the following terms: [His Lordship read it, see *ante*, p. 714.]

If the intention of the parties is to be collected from the written contract alone, as payment was to be made only on the completion of the cargo, according to the case of *Appleby* v. *Myers* (1) until the cargo was completely made up no interest in it passed to the purchaser. But although the purchaser of a cargo may have no interest in it until a certain event, as for instance until delivery, he may, if he pleases, expressly take upon himself all risks and dangers of the voyage, as in *Castle* v. *Playford* (2), although without a stipulation to this effect he would not be affected by anything which might happen to the cargo in its transit to him.

In the present case it is contended that, either under the 723] *contract itself, the appellant's risk began as soon as any rice was shipped on board the Sunbeam, or that the act of effecting an insurance on the rice by the appellant was an agreement on his part to undertake the risk. Assuming that the intention of the parties may be implied from their acts, and so become a term in the contract, the acts ought to be such as to manifest that intention without ambiguity. The acts relied upon in this case are a notice from the vendors to the purchaser to effect an insurance on the rice in the Sunbeam, and a policy of insurance effected by the purchaser accordingly, describing the adventure as "beginning upon the goods and merchandises from the loading thereof aboard the ship, and to continue and endure during her abode at Rangoon," &c.

It seems to me to be clear that unless a change was produced in his rights and liabilities under the contract, by his undertaking the insurance, Anderson would have had no interest in the rice until a complete cargo had been shipped. But although this was his position in relation to the contract itself, he had a contingent benefit which might accrue to him from the completion of the cargo on board the Sunbeam, and its safe delivery. This contingent benefit was one on expected profits, and although it would not be protected by an insurance on the rice, *Lucena* v. *Craufurd* (3), yet Anderson having that contingent interest in the safety of the cargo, might not be disposed to take upon himself an insurance against its loss, more especially as he would

(1) Law Rep., 2 C. P., 651. (2) Law Rep., 7 Ex., 98. (3) 2 B. & P., N. R., 269.

have an interest in the rice itself at Rangoon, as soon as the cargo should be completed.

Did this insurance throw the risk of the loss of the rice upon him? Did he, by undertaking it, impliedly agree with the vendors that if the rice was destroyed after any part had been shipped on board the Sunbeam the loss should be his? Did this act change the nature of the contract, the stipulations of which, enabling the vendors to take the bill of lading in their own name, and to send it forward with the draft, being *prima facie* (though not conclusive) evidence of the interest and property remaining in them? What is the nature of the risk which Anderson is supposed to have undertaken? In the words of Mr. Justice Blackburn in *Castle* v.**Playford* (1), it was this: [724 "If the property perishes by dangers of the seas, I shall take the risk of having lost the property, whether it be mine or not." If this really was his undertaking every bag of rice the moment it was shipped on board the Sunbeam was at his risk, and the loss of it must have fallen upon him. But the Court of Common Pleas held that as Anderson would not, if the ship had sailed and arrived with what was on board of it when it sank, have been obliged to accept what was on board, he was not bound to pay for the rice on board, lost at the time of the sinking. From which it would seem to follow that Anderson was not exposed to any risk of loss before a complete cargo had been shipped in the Sunbeam.

There being, therefore, conflicting evidence of intention as to the interest in the rice passing to the purchaser, or remaining in the vendors, the effect of the written contract being that the interest was to continue in the vendors till the completion of the cargo, and the consent of the purchaser to insure not shifting the property during the loading and before the cargo was complete, and being at the utmost an uncertain indication of his intention to assume the risk, I think we ought not to look out of the contract, but to determine the rights and liabilities of the parties by it alone.

It is not disputed that by the terms of the contract Anderson was not bound to take less than a complete cargo of rice, and that he had an option either to accept or reject a part cargo. If he had exercised this option by accepting what was on board before the Sunbeam sank, as a fulfilment of the contract on the part of the vendors, he would have had an insurable interest in the rice at the time of the

(1) Law Rep., 7 Ex., 98.

loss. The judges in the Court of Common Pleas thought the property had not passed out of the vendors at this time, but they were of opinion "that there was such an appropriation of the rice on board to the contract, as to prevent the sellers from withdrawing that rice without the consent of the buyers;" thus apparently fixing the buyers with the risk of the rice from time to time as it was put on board. Upon this Mr. Justice Blackburn, in his judgment in the Exchequer Chamber, observes (1), "If we could see 725] anything to indicate an intention that as each bag *was shipped it should be at the buyer's risk, we should think it indicated an intention that it should not be taken out without his consent, but we cannot find anything to this effect."

Now, an intention that each bag of rice shipped should be at the risk of the purchaser is necessary to be established as a foundation for the argument maintained by the learned counsel for the appellant, that if part of the rice had been shipped, and had been damaged while on board, the vendor might, without removing it, have gone on loading the rice until a full cargo had been put on board, and have delivered it to the purchaser, who would have had no option, but must have accepted it as a faithful performance of the contract. Sir Henry James went farther than this, and argued that even if the part of the cargo shipped had been totally destroyed by fire, and the vendors had come with a farther quantity of rice to be shipped, the master must have taken it in, and if the Sunbeam had afterwards arrived with a quantity of rice, which, together with that destroyed, would have amounted to a full cargo, the purchaser could not have refused to accept it. This rather bold proposition requires for its support (as already stated) that it should first be established that each bag of rice as it was shipped on board was appropriated to the purchaser, and was at his risk.

It was said that Baron Bramwell, in the judgment of himself and his brother Barons, agrees that if the rice on board was damaged the vendors might go on and complete the cargo, and maintain that they had fulfilled their contract. But the learned Baron by no means expressed an unhesitating assent to the proposition, for, after observing that the rice was not to be the purchaser's property or at his risk till completion of the cargo, he went on to say (2), "Save possibly, as was suggested, that if any of the rice during the loading, and after it was on board, had been damaged, the sellers might complete the cargo, and insist

(1) Law Rep., 10 C. P., at p. 620. (2) Law Rep., 10 C. P., at p. 623.

that they had fulfilled their contract by shipping merchantable rice."

Assuming that the rice was not the purchaser's property, nor at his risk, as Baron Bramwell thought, I cannot agree that in the circumstances supposed there could possibly be a performance of the contract. The purchaser was entitled to a full cargo of *merchantable rice, and was not [726 bound to accept less than a full cargo. If so, how could he have been compelled to take a cargo which consisted only partly of merchantable rice, or part of a cargo the other part of which had been destroyed?

But even if the purchaser might, in the supposed case, have been placed in the position of being forced to accept a partly damaged or partially destroyed cargo, this could only be after the vendors had from first to last put on board a quantity of rice which, with reference to the number of bags actually shipped, would have amounted to a full cargo. When the loss occurred, this had not been done, and the purchaser had not exercised his option to accept the incomplete cargo. The learned counsel for the appellant argued, that after the Sunbeam sank with a deficient cargo, the purchaser had a right to exercise his option and to accept the rice at the bottom of the river, in fulfilment of the contract. And the Court of Common Pleas held (1) that although the plaintiff had an option, which existed at the time of the loss, of rejecting the rice, on the ground that a full cargo had not been shipped, he "was entitled as against the defendant (the underwriter) to decline to exercise that option, and to insist that the contract of purchase and sale was fulfilled by the loading, on behalf of the vendors, on board the Sunbeam, of the rice which was on board when the ship foundered; and that consequently the property in such rice was in him, the plaintiff, at the time of the loss."

But it appears to me that the right to exercise the option must be distinguished with relation to different parties. As between the purchaser and vendors there was nothing to prevent the purchaser, if he chose to do so extraordinary a thing, to take to the perished rice, and pay the invoice price of it. But the case is one between the purchaser and the underwriters. The purchaser was entitled to a cargo of rice shipped on board the Sunbeam; the option which he was entitled to exercise related to a cargo on board that vessel, and no other. Both vessel and cargo were utterly lost; what subject was in existence upon which an option could be exercised?

(1) Law Rep., 10 C. P., 75.

It was argued, that if a purchaser of goods had an option to accept the delivery of them, he might exercise such op-
727] tion after *the goods had been lost. He might certainly, if the property in the goods had been in him, for then the right would have been, not a right to accept what had already become his, but to refuse them as not fulfilling the contract. That was the case of *Sparkes* v. *Marshall* (1), cited as an authority in favor of the appellant, where it was held that a purchaser having a right of option to accept or reject goods, might exercise that option against underwriters, after the loss of the goods *in transitu*. That case turned entirely on the fact of the oats, the subject of the contract, having been appropriated to the plaintiff, and the interest in them being vested in him at the time of the loss. The case is therefore clearly distinguishable from the present, where the purchaser, having an unexercised right of option, before the loss, as to the cargo of rice, wherein no interest had passed to him, took upon himself to accept and pay for the goods.

After the loss the purchaser was not bound to pay for the rice, the vendors could not have insisted upon payment. If there had been no insurance, it cannot be supposed that the purchaser would have taken to and paid for the rice at the bottom of the river. The payment was entirely voluntary, and instead of being the exercise of a *bona fide* option by the purchaser, was only made by him, and accepted by the vendors, with the view of relieving themselves and throwing the loss upon the underwriters.

I think that the judgment of the Exchequer Chamber is right, and that it ought to be affirmed.

LORD HATHERLEY: My Lords, I feel that this is a case offering many points of difficulty, and, as we have seen already in the courts below, it is one upon which considerable differences of opinion may exist upon the documents and the evidence which have been placed before us for our decision. The documents are scanty, and we are driven to draw such inferences as we best may from the exact wording of the language of the contract, and from the transactions which took place at the time it was made, as bearing upon the question of the risk of the assured in those goods, which were the subject of the policy, when the property
728] was destroyed by an *accident. It was such an accident as would clearly be within the terms of the policy if we could hold that the assured had such an interest as he could insure, and was subject to such a loss that re-

(1) 2 Bing. N. C., 761.

quired him to be indemnified by virtue of his contract of insurance.

Now, the original document itself, by which the purchase of the rice was made, appears to me, when it stands alone, to be very plain and clear in its construction. The rice bought, the subject-matter of the contract, was "the cargo of new crop Rangoon rice per Sunbeam." The Sunbeam is described by a foreign register; the ship is said to be No. 1,254 in a book equivalent to certain books which are kept here with reference to the classification of ships. It is described as "700 tons register, No. 1,254, in Veritas," and the price of the rice is fixed at so much "per cwt., cost and freight." The freight appears to be included with the price. And it is stated that it is "expected to be March shipment, but the contract is to be void should vessel not arrive at Rangoon before April, 1871." Then the payment is to be made "by sellers' draft on purchasers at six months' sight, with documents attached."

The court below has held that on the face of that document, in the first place, it would appear to have been intended by both parties that the subject-matter of the contract should be a full and complete cargo of this ship Sunbeam, whatever that fit and proper cargo might be; and, secondly, that, so far as the contract itself is concerned, the provision that the payment was to be made "by sellers' draft on purchasers at six months' sight with documents attached" indicated that the property should not pass from the vendors to the purchasers, at least until the vendors were in a condition to attach such documents, which again would lead to the conclusion that the property was not intended to pass until a complete cargo had been supplied to the vessel, and the bill of lading, one of the documents in question, could be attached.

That being the state of things, and the question arising as to who was to be at the risk during the loading, the question of whose the risk was will not be determined solely by the question of property. That is shown by many authorities, to which copious reference has been made during the argument. It is perfectly conceivable—indeed, in many cases it has been so as a matter of *fact—that a person, sell- [729
ing some goods at a distant place to a person living in this country, may say "I am perfectly willing to sell you these goods. I am perfectly willing to complete the cargo so to be sold, but I do not intend to be at the risk of their loss during the transit or on the voyage; and although you will not be expected to pay for the goods and acquire the prop-

erty until you have the bills and the documents attached sent to you, still in the meantime there will be a risk in transit, and that is a risk which I am not desirous of undertaking, and I must throw that risk upon you as part of our bargain." Although nothing is distinctly said to that effect in this contract, there are other matters in evidence which might be sufficient to imply that it was part of the arrangement (and so, indeed, I think the court below, the court from which this appeal is brought, may be said to have held) that when all was complete, when the cargo was complete, when the documents were obtained which were to be attached to the bills that were to be drawn, when all that was done, although it might still be held that the property had not passed until the purchaser was in possession of these bills and these documents, yet at the same time the intermediate risk—the intermediate loss if such there should be—should not be at the vendor's risk, but at the purchaser's. And that may be brought before the court by evidence collateral to the contract.

In the present case the evidence stands thus: As a matter of fact it appears that the purchaser, Anderson, the appellant, on the 3d of February, immediately after the contract, which was dated the 2d of February, in London, instructed the insurance brokers to insure a "cargo of rice per Sunbeam, 1,254 Veritas, Rangoon to the United Kingdom," which evidently refers to the contract of which I have been speaking. That is answered by the brokers stating that they have acted upon that authority. After that there arrives a letter from Messrs. Thomas Gray & Walker, who had negotiated the contract in London, to Anderson, informing him of a telegraphic message as follows: "We beg to advise having received the following telegram from Calcutta, dated 6th March, Sunbeam, Rangoon, advise Anderson, insurance."

It has been said—and I myself am inclined to take that view also—that from the fact of this message sent to Ander-
730] son "advise *Anderson, insurance;" coupled with the fact that Anderson did insure immediately after entering into the contract, and that the vendors did not insure (because both points are of some importance)—from the whole of these circumstances put together it may be inferred that the purchaser was to bear the risk of anything that might occur in the transit of the goods from Rangoon to this country. This telegram indicates that the ship Sunbeam having arrived at Rangoon, the vendors desired to remind Anderson of the duty of insurance if he wished to escape

from the risk which the vendors considered him bound to undertake. Although, therefore, there is nothing in the contract *per se* which would indicate that Anderson was to be at the risk of any intermediate loss of the vessel before being ready to sail, yet putting all these circumstances together,—namely, that he did in fact immediately give directions for insurance, that he received from the vendors this letter and telegraphic message reminding him that he should insure, the vessel having actually arrived at Rangoon,—one may infer from all these points put together as matters of evidence, that the engagement was that the vessel on its voyage, and the goods also, were to be at the risk of Anderson.

Now comes the question, what was it that was to be at the risk of Anderson? I apprehend that what was to be at his risk was what he had purchased. It appears to me that he was to be at the risk of the cargo which was to be sent to him by the Sunbeam, and that the property would not pass until that thing was brought into existence which he had bought. Now the thing he had bought was I think confessedly, on the part of the judges who took the one view or the other of this question in each court, a whole and complete cargo of rice to be shipped by the Sunbeam. The vendors could not have sent him half a cargo; or, if it had been sent, he might have had the option of saying, I will take it; but he had not bought it. He might also say, under my contract if you put half a cargo of rice on board the Sunbeam, and bring it here and tender it to me as the cargo, I may take it if I choose to exercise such an option; but I am not bound to take it, and I decline it. Until he had exercised such an option the property had not vested in him. I apprehend that until he had got the thing which was contracted to be sold, namely, a full and *complete [731 cargo, he had not got anything that could possibly vest in him, whatever might be said of the whole cargo when completed, although completed in Rangoon, and before he received the bills of lading and other documents, together with the drafts which were to be drawn for the price of the goods and the freight.

Then, my Lords, the argument is put thus; it is said, he having this option to accept or not as he pleased, and having the Sunbeam at Rangoon as a vessel which might be considered in the light of being his own vessel, inasmuch as, under the contract, the freight of that particular vessel, as well as the price of the goods sold, was to be paid by him, it comes to this, that it was as though he had sent the Sun-

beam to receive the goods, and when each bag of rice was put on board that ship it was on board for his benefit, and was specially appropriated to him as purchaser, and could not have been removed without his consent. The learned judges in the Court of Common Pleas viewed the matter in this light. In the judgment, from which a passage has been read by my noble and learned friend now on the woolsack, I mean the judgment of Mr. Justice Blackburn in the Court of Appeal, the view that when once any particular bag of rice had been put on board the vessel it could not be removed without the consent of Anderson, the purchaser, is commented upon. That learned judge, and those learned judges who agreed with him, proceed as far as this, that it might well be that the bags of rice placed on board this vessel, when once so placed, could not be removed without the consent of the shipowner or the person with whom the contract had been made for the vessel, that is to say, the charterer; but the judges below having said it could not be removed without the consent of the buyer, Mr. Justice Blackburn makes this remark: "The court below say that putting any rice on board the Sunbeam was such an appropriation of the rice on board as to prevent the sellers from withdrawing that rice without the consent of the buyer. If we could see anything in the contract to give the buyer a right to object, we should think it indicated an intention that the property so put on board should be at the buyer's risk; but we cannot find anything to that effect. If we could see anything to indicate an intention that as each bag was shipped it should be at the buyer's risk, we should 732] think it indicated an *intention that it should not be taken out without his consent. But we cannot reason in a circle."

Now, my Lords, I apprehend that you must look to the contract to arrive at a conclusion on this point, and, looking at the contract, I confess I agree with Mr. Justice Blackburn. I can find nothing to say that when once 100 bags have been put on board, those 100 bags could not be removed without the vendee's consent. It is easy to suppose circumstances in which this question might have arisen. The vendors of the rice might have had some other vessel to fill in a shorter time than this; this was to be filled by a specified time, and they were put to difficulties about filling it in that time as it was; it might have been otherwise; it might have been that they had ample time to fill this vessel, and that they had not so much time to fill another, and consequently they might have been desirous to transfer some bags of rice

from this vessel to the other one, or they might have desired to do so, if any accident had happened to a lighter coming down the river to the other vessel which they were bound to load in a given time. If they were minded to transfer part of the rice on board this vessel to another vessel—always considering such claims as might be set up by the shipowner himself, when the rice had once been put on board the ship, to have the loading completed—subject to such claims, I cannot myself see that the vendee could have had anything to say against their removing that rice, provided always that they filled the Sunbeam within the time provided by the contract, and in other respects complied with the terms of the contract. It strikes me that there is nothing upon the face of the contract to say that the contract was not to be performed in any degree piecemeal, or that anything had been bought except a cargo, by which I think was meant a full cargo, of merchantable rice—the Sunbeam's cargo—subject, of course, to arrangements between themselves as to what was a proper cargo for the Sunbeam as to weight and so forth, all of which would be readily understood by men entering into contracts and dealings of this description.

But, my Lords, it was said with reference to this part of the case—it was rather put as illustrating how far that view would be supposed to carry their argument—but we hold that if so many *(say, 100) bags of good merchanta- [733
ble rice were placed on board that vessel in the course of loading, and, before the cargo was completed, those 100 bags had become destroyed by the entrance of sea water or some other accident, a risk of the sea, then the vendor would have fulfilled his contract of supplying the cargo of rice, provided he afterwards added sufficient rice, instead of the bags which had been destroyed, to make up the full cargo. I cannot accede to that proposition in any shape or form; it is certainly putting the case very high—yet I cannot say that I am driven to come to a contrary conclusion by such an argument. It appears to me beyond all doubt that what the vendor had to furnish was a cargo of merchantable rice; and if when the vessel arrived at Rangoon, or at any time before the cargo was completed, and before the documents could possibly be obtained, that rice had been utterly destroyed and wasted, I think the vendee would most undoubtedly be in a position to say: You have not supplied to me that which I bought, namely, a full cargo of merchantable rice; it was not, at the time when the loading of the cargo ceased, a full cargo, and from that time

it never has been a full cargo of merchantable rice, and take it I will not—I apprehend he would have been perfectly justified in so saying.

My Lords, if that be so, I am quite unable to see how this rice, supposing the whole cargo of it when completed was to be at the risk of the vendee, can be said to have been at his risk when the thing he bought never had been brought into existence at all. The vessel unfortunately sank before the cargo of rice had ever been completed, and therefore the thing which was to be insured against had never come into existence, and of course the vendee had never acquired an interest in that which had never been in a state in which it could be tendered to him for his acceptance.

But then it is said that he had an option which he might exercise, and that he might say,—Although this rice has been destroyed, although it never left the river of Rangoon, but sank to the bottom before the thing I bought was completed, I will exercise my option of taking it now, though the incomplete cargo has been destroyed. I apprehend it is quite impossible to say, and no authority certainly goes anything like the length of saying, that, as against third 734] persons, and merely for the purpose of *making those persons liable, the vendee could exercise the option which he had—or which, if the thing in any shape or form had been brought before him, that is to say, if the half cargo had been sent to this country, he might have had—of saying whether he would or would not take it. It is impossible to say that he had vested in him such an interest in that which went to the bottom, and which did so before the actual thing he bought came into existence, that he could exercise his option of taking it so as to throw the loss upon third persons. It would be merely nominally—by a mere passing of pieces of paper—that he could be said to have exercised any option at all about such a subject-matter; and to say that he could do that for the purpose of throwing a loss on the underwriters is not a reasonable argument. It has been said that Mr. Baron Bramwell accepted that argument. I do not read his Lordship's observations as leading to that result. I read Mr. Baron Bramwell's observations as meeting the argument, if it could have had any force at all, by certain observations of his own. My noble and learned friend now on the woolsack has already shown that there is not any actual adoption on the part of Mr. Baron Bramwell of the argument so suggested.

But one argument on which much stress has been laid is

this: if you once concede, which I am disposed to concede, that there was to be an insurance to cover the risk at some period or other, then looking at the whole transaction and all that has passed in the matter, it is unreasonable to suggest that with regard to the loading of this ship there should be two separate periods of risk to be covered by two different insurances, the risk being of the same character and relating to one and the same ship, and to one and the same subject-matter; and that, therefore, if you suppose that the risk was to be at any time thrown upon the vendee, you must take it that it was not expected by him, or by anybody else, that there should be one risk in the river whilst the process of loading was going forward, and another risk to be incurred when the vessel started on her voyage, and that each of these two risks were to be separately insured for, the one by the vendor and the other by the vendee. Now, my Lords, I apprehend that that argument is one which cannot, with all respect, commend itself to your Lordships. One answer which has been suggested to that argument is that, as *regards all the barges bringing [735 the rice intended for the Sunbeam down the river to be placed on board that vessel, the difficulty is just as great and involves as unreasonable a supposition as exists with regard to the cargo itself. But, my Lords, I apprehend the true answer to the argument is this—I think both Mr. Justice Blackburn and Mr. Baron Bramwell mention it—it is that neither party thought of this risk at all. Evidently it did not occur to anybody's mind that there was this danger, in a river like the river at Rangoon, in the actual loading of the vessel, and that there was a risk that the vessel might sink before the parties were in a position to say that the purchaser had agreed to take the risk upon himself, because that which he had agreed to insure against was in existence, namely, the full cargo. I find in the contract nothing to say that the goods were purchased bag by bag as they were placed in the vessel. I find nothing in the contract, or in the surrounding circumstances, which says that the purchaser intended to take the risk until the thing existed against the loss of which he intended to be insured. Therefore it appears to me that to that argument, namely, the argument *ab inconvenienti* as regards such a contract being entered into, the best answer is, that neither of the parties thought of this particular risk—it did not occur to their minds that the particular thing which happened might happen. And that is not an unusual circumstance, as your Lordships are aware, in insurances of this character, for we

often find that the very thing which has happened is just the thing which both parties omitted to think of and to provide against—at all events it appears to me, that in this case, provided against it they have not. With regard to the possibility of ratifying the contract, I think the reasons given by Mr. Justice Blackburn show clearly that *Sparkes* v. *Marshall* (1) has no application to this case. That was a case where a man having adopted a contract was called upon by the insurers, for their benefit, to exercise a possible option of saying, I ought to be released from it. That is a very different thing from saying: Not being bound by the contract I will consent to be bound by it for the sake of handing over to the vendor, whom I am not obliged to indemnify in any way, the proceeds of the insurance which I have effected.

736] *I apprehend that the right way of regarding the whole case is this, and that is the way in which the learned counsel for the respondent concluded his observations: "Was there at the time that this accident happened any liability whatsoever on the part of the vendee, whereby he was subjected to loss, against which by the contract of insurance he ought to be indemnified?" It appears to me to be impossible to say, that when the vessel went to the bottom any action could have been brought, or any proceedings taken against the vendee, in respect of that quantity of bags of rice which had been loaded on board the Sunbeam. It is another form of the same proposition to say that he was not insured against the loss of that quantity of bags. With regard to the contract itself, I find extreme difficulty in coming to the conclusion that when a man had purchased a cargo of rice to be shipped per Sunbeam, and a fourth part, or a third part only, of the cargo had been placed on board the vessel, and then what was on board had been wholly lost, he was under a liability or engagement which would subject him to loss.

I regret, my Lords, that there should be a difference of opinion in your Lordships' minds, as I know there is, from having had the advantage of seeing a judgment of one of my noble and learned friends. I can only say that I do not see my way to hold that the judgment ought to be reversed; on the contrary, I think it should be affirmed by this House.

LORD O'HAGAN: My Lords, I concur with my noble and learned friend who first addressed your Lordships that this case is one of great nicety and difficulty; as has been suffi-

(1) 2 Bing. N. C., 761.

ciently manifested by the conflict of judgment in the courts below, and, I am sorry to add, in your Lordships' House.

We have here an appeal and a cross appeal, the latter, on one point, impeaching the unanimous opinion of all the judges in the Courts of Common Pleas and the Exchequer Chamber. But although the point on which they all agreed was that to which the great bulk of the evidence at the trial before Mr. Justice Brett was addressed, and although it was the subject of elaborate discussion, especially in the Court of Common Pleas, I need not deal with it at *any length. [737 It was not formally abandoned at the bar, but it was lightly touched and scarcely relied on; and I think your Lordships may confidently hold that there was evidence to sustain the verdict, which found that the loss was caused by the perils of the seas. Some such evidence there clearly was, and although the opinion of the learned judge at the trial, as to the effect of it, does not appear to have harmonized with that of the jury, he properly declined to act on that opinion, as against their finding; and, as I have said, in that proper and constitutional course he has been sustained by all his colleagues. The verdict, therefore, upon the issues submitted to the jury, must be maintained; and I refer to it even thus briefly only for the purpose of pointing to the fact, as bearing more or less on the matters really in controversy, that the original resistance to the plaintiff's claim was chiefly based, so far as I can judge from the documents, not on a challenge of his insurable interest, but on the denial that his loss had been caused by the means which must now be taken, conclusively, to have produced it.

Passing on to the questions which are still open, and which have been argued, on both sides, with conspicuous ability, I note that they really divide themselves into two. First, had the plaintiff any property in the rice which was put aboard the Sunbeam, and was lost by the perils against which the insurance was designed to guard? And, next, whether he had or had not—had he such an interest in the adventure, because it was at his risk, that he could validly insure?

On the first point, I incline to agree with the Court of Common Pleas, that the rice which was actually put on board was so appropriated to the purchaser, regard being had to the terms of the contract and the circumstances of the case, as to give him, at least, the option of retaining it, and to take from the vendors the power of removing it without his permission or against his will. The contract of the 2d of February, 1871, provided for the sale of "the cargo

of new crop Rangoon rice," without farther specifying its quantity or quality, but describing it as to come by a named vessel, of a certain tonnage, and of a particular number, and to arrive at a specified place, before an appointed day. The bought note made the purchaser liable for a certain
738] sum "per *cwt., cost and freight," so that the plaintiff had bargained to receive, in a vessel which did not belong to him or to the seller, but which was hired for him, and for the time was dedicated to his service, and so, in a sense, was temporarily his own, a cargo, the amount of which was to be ascertained not by prior agreement, but by the capacity of the vessel, and subsequently the ascertainment of the weight. The arrival at Rangoon took place before the period fixed for it; and the loading of the cargo began and had considerably advanced when it was unfortunately destroyed.

The argument of the respondents is, that until the cargo was completed it did not become deliverable; and until it became deliverable, the property could not pass. No doubt the bill of lading was issued after the loss, as were the drafts by which the price was disbursed to the vendors; and the parties, we may presume, contemplated payment after the completion of the cargo. But the period of payment does not necessarily coincide with the period of possession, and, quite independently of the arrangement as to the bills of lading, and the determination of the price upon a future estimate, it seems to me that the partial delivery to the plaintiff in a vessel which the contract had made, *pro hâc vice*, the sole recipient of his cargo, may be taken to have passed the property in the portion so delivered, involving an interest, either absolute or conditional, on the exercise of an option, to receive what was so given on account of, or in substitution for, the whole, sufficient to justify his claim on the insurers. He might have exercised the option in declining to take less than the full cargo; but if he did not, the property in the goods partially delivered, according to the view of the Court of Common Pleas, in which I concur, was his, as it would have been in the rest, on a complete delivery.

On this part of the case *Appleby* v. *Myers* (1) was much relied on. But the decision there went on the express terms of the particular contract, to which I find nothing exactly answering in that which is before your Lordships. In delivering the judgment of the court, Mr. Justice Blackburn said (2) that "generally, and in the absence of something to

(1) Law Rep., 2 C. P., 651. (2) Law Rep., 2 C. P., at p. 660.

show a contrary intention, the *bricklayer, or tailor, [739 or shipwright, is to be paid for the work and materials he has done and provided, although the whole work is not complete." "But," he added, "though this is the *prima facie* contract between those who enter into contracts for doing work and supplying materials, there is nothing to render it either illegal or absurd in the workman to agree to complete the whole, and be paid when the work is complete, and not till then, and we think that the plaintiffs in the present case had entered into such a contract." There, the period of the completion was fixed by the agreement of the parties as the period of the payment, and nothing could be got sooner, though the completion was prevented by an accident for which no one was to be blamed. Here the terms of the note do not point to the occurrence which caused the loss, but neither do they indicate an intention that the goods in the process of loading shall not vest in the buyer, at his option, before it is ended.

Two cases were cited in the course of the argument which appear to me to have a material bearing, in this regard, on that before us. In *Aldridge* v. *Johnson* (1) the plaintiff had agreed to purchase 100 out of 200 quarters of barley which he had seen in bulk and approved of; and had paid part of the price. The purchaser was to send sacks for the barley, and the vendor was to fill those sacks and take them to a railway to be conveyed to the plaintiff free of charge. Sacks were sent for a part only, and so much was delivered; but though the plaintiff repeatedly demanded the remainder, he could not get it. The court decided that the portion put into the sacks passed to the plaintiff, Lord Campbell holding, that no portion of what remained in bulk ever vested in him. "It is equally clear," he said (2), "that as to what was put into the sacks there must be judgment for the plaintiff. Looking to all that was done when the bankrupt put the barley into the sacks, *eo instanti* the property in each sackful vested in the plaintiff." And he relies on the *à priori* assent of the plaintiff, and on his subsequent appropriation. "There remained," he says, "nothing to be done by the vendor, who had appropriated a part by the direction of the vendee."

The second case to which I have referred is *Langton* v. *Higgins* (3). There the plaintiff had bought all the [740 crop, for oil of peppermint, grown on a farm. The vendor sent to the plaintiff for bottles, which he delivered, and a portion of the crop was put into some of them; but the

(1) 7 El. & Bl., 885. (2) 7 El. & Bl., at p. 899. (3) 4 H. & N., 402.

rest were sold by the vendor to a third person, against whom the plaintiff brought detinue. It was held that the putting of the oil into the plaintiff's bottles was an act of appropriation which vested the property in him. The Chief Baron (Pollock) founded his judgment on the authority of *Aldridge* v. *Johnson* (1), deciding, as he said (2), "that the putting of the barley into the sacks was an appropriation which passed the property." And, farther, he observed: "I am of opinion that the putting of the oil of peppermint into the bottles was the same thing as the delivery of it to the plaintiff." Baron Bramwell (3) also observed: "In all reason, when a vendee sends his ship, or cart, or cask, or bottles to the vendor, and he puts the article sold into it, that is a delivery to the vendee" (i.e. a delivery of the whole or part), for he adds: "Again, suppose only a portion of the oil had been put into the bottles, inasmuch as the plaintiff was not bound to take a part only, would the property vest?"—(The very case your Lordships have to consider.)—"*Aldridge* v. *Johnson* (1) is an authority on that point. It may be that the plaintiff would have the option of refusing to take a part only of the oil or of accepting it; but that right is not inconsistent with the property vesting at his election. It might vest in him conclusively; but, at all events, it would vest when he exercised the option."

It seems to me that these cases, if they were well decided, and I see no reason to call their authority in question, go far to sustain the view of the Court of Common Pleas on the point I am considering. They establish that the filling of the sacks and bottles amounted to an appropriation of their contents to the persons to whom they respectively belonged. And they establish farther, that, in the case of a partial delivery, although all the goods, which are the subject of an integral contract, have not been delivered, there 741] may, in certain circumstances, be such an *appropriation of a portion as to pass the property in it. According to Lord Campbell, at the moment when the barley was put into the sacks, "the property in each sackful vested," that is, there was a successive vesting, sack by sack; and whether one only, or a hundred, had been filled, the contents of each of them passed *eo instanti* to the purchaser. Baron Bramwell gives a reading on this decision in his own judgment, and applies it to demonstrate that "though only a portion of the oil had been put into the bottles," and "the plaintiff was not bound to take a part only," never-

(1) 7 El. & Bl., 885. (2) 4 H. & N., at pp. 407, 408. (3) 4 H. & N., at p. 409.

theless it vested either conclusively or on the exercise of his option.

Now, what have we here? A vessel is hired to do the plaintiff's work (just as the sacks or bottles might have been hired to receive the barley or the oil), and designated as the recipient of the rice. What is the difference? The vessel was specifically described, and in it only, and for the plaintiff only, the cargo was to be deposited. Was not the deposit in it of the same effect for the purpose of the vesting of the property, with that of the deposit in the sacks and the bottles? And if the deposit in them was, in the words of Chief Baron Pollock "a decisive act of appropriation," or according to Baron Bramwell, amounted, in all reason, to "a delivery to the vendee," why should we deny the same operation to the deposit in this case? Lord Campbell relied on the *à priori* assent of the vendee of the barley, and his subsequent appropriation. And here we have what Chief Justice Erle once denominated "an anticipative appropriation" in a contract, without any condition of inspection or approval, to receive a "cargo" not in any way particularly described; and, as has been argued, not only a prompt payment by his drafts, but, perhaps, an anticipative exercise of the plaintiff's option, by insuring, and so manifesting a purpose to receive, in the vessel, that cargo, and every part of it, at his own risk. There was nothing more to be done in the case than in *Aldridge* v. *Johnson* (1), as in both the delivery was only partial, and the residue of the property remained to be given.

The answer to this argument, as I understood it, was based on the fact that the vessel was not the plaintiff's absolute property; but if it was hired for his benefit, and he was entitled to the exclusive *use of it, for the reception [742 of the cargo he had bought, I am unable to understand that it was not his, for the time, to receive his cargo; and that it should not be dealt with accordingly for the purposes of this case. Would a delivery at a house hired by a vendee, for a day or a year, be less a delivery to him than if he held that house as a proprietor in fee?

I am, therefore, disposed, on principle and authority, to adopt the unanimous view of the learned judges of the Common Pleas, that the plaintiff had an insurable interest, "on the ground," as they have stated, "that the property in the rice had vested in him before the loss" (2).

But if there should be doubt on this point—and I cannot say that it is not open to serious question when there is such

(1) 7 El. & Bl., 885. (2) Law Rep., 10 C. P., 58.

an equal balance of judicial authority upon it—I think he is still more clearly entitled to recover, because the contract and the conduct of the parties appear to me to afford sufficient evidence that the cargo, and every portion of it, were to be at his risk from the moment of delivery aboard the Sunbeam; and that he had, on that account, an insurable interest which warrants his demand. Mr. Justice Blackburn observed, in the Exchequer Chamber, that "risk and property generally go together." This is true, but they are not necessarily associated; and the risk only will suffice to sustain the insurance. It has been said, that insurance is a contract of indemnity, and the question has been put, What was the plaintiff's loss? But we must remember that "although," in the words of Mr. Phillips (in Phillips on Insurance) (1), "the peril must be such that its happening might bring upon the assured a pecuniary loss, it is sufficient that it might bring a loss, and by no means necessary that it should certainly have that consequence, were it to happen." The law is well stated by Mr. Justice Willes in *Joyce* v. *Swann* (2), that even if, by reason of special circumstances, the property did not pass on shipment, yet, by reason of the risk, the buyer might insure the cargo in respect of the interest he had in it.

The question, therefore, is, at whose risk was the cargo? What was the intention of the parties to the contract in rela-
743] tion to it? *What was their understanding as proved by their words and their acts?

The liability to insure and the fact of insurance are, I think admittedly, strong indications pointing to the individual on whom it is designed that the risk of loss shall fall. It is reasonable so to consider them, for the casting of the liability on a man is a tolerable warning to him that he will suffer damage in the case of accident, unless he guards himself against it: and the fact of his insurance is a pregnant acknowledgment that he fears to encounter it, and accepts the burthen which the liability implies. Now, by the contract in this case, the liability to insure was thrown upon the purchaser, if upon any one. The costs and freight only were provided for. He bought at 9*s.* 1½*d.* per cwt. "cost and freight." If cost, freight, and insurance had been contemplated, the sum would have been 9*s.* 7½*d.* There is nothing to show, directly or by implication, that the seller was to bear the risk, from any requirement that he should be protected against it. That seems the fair effect of the bought note considered in itself.

(1) Ch. iii, s. 174. (2) 17 C. B. (N.S.), 84.

And then it has the clearest construction practically put upon it by the conduct of the parties. The seller does not think of insuring, and does not, in fact, insure at all. The buyer, on the contrary, insures on the very day after the contract is executed; manifestly not for any indirect purpose; not *post litem motam;* but in the fair, prudent, and reasonable fashion of a man having risk to run, and therefore interest to seek an indemnity. The insurance so effected was by a policy in the common form, beginning—"the adventure on the said goods from the loading thereof aboard the said ship." And it covered the entire cargo during the whole of the period from the first delivery until all had been put aboard; and from the time of that first delivery until the arrival of the ship at its destination.

If the matter rested there the contract, whether taken by itself or viewed in the light of the subsequent transactions, would be persuasive as to the incidence of the risk. But there is more to be considered. According to that contract it was "to be void should vessel not arrive at Rangoon before 30 April, 1871." It did, in fact, arrive on the 6th of March; and, on that day Messrs. Gray & Walker forwarded to the plaintiffs a memorandum from *Messrs. Bar- [744 radaile, Schiller & Co. to this effect: "We beg to advise having received the following telegram from Calcutta, dated 6th March, 'Sunbeam Rangoon. Advise Anderson, insurance.'" Now, what did that mean? It does not appear that the plaintiff had informed the vendors of the insurance he had effected on the day after the contract was made. That contract did not subject him to any liability before the arrival of the vessel at Rangoon; and, as soon as it did arrive, and before any portion of the rice was received, the vendors gave him notice of the arrival, accompanying that notice by the significant word "insurance." What did this convey, but that he should look to himself and insure against the risk before its commencement, when the loading should begin, as it did, three days afterwards? What other reasonable interpretation can be put upon the telegram? And if this was its real meaning, does it not go far to demonstrate the understanding of the senders and the mutual understanding between them and the purchaser, that he, and not they, should insure, because with him, and not with them, would be the risk from the moment of the reception of any portion of the cargo aboard the Sunbeam. I cannot conceive that any other meaning can be fairly attributed to the words; and if they have no other, they appear to me conclusively to show the intention of the parties that the

plaintiff should insure, because in the event of loss he must be the sufferer.

But there is still more in the case. The correspondence which ensued immediately after the loss of the vessel indicates, in the plainest way, that all the parties engaged in the affair believed the risk of the cargo to be upon the plaintiff. He is at once advised of the loss of it, and at once replies that he is "covered by open insurance policy to the extent of £6,000 at Lloyds." On the 12th of April Messrs. Barradaile, Schiller & Co. send to him the invoice of the rice taken on board, viz., 8,878 bags, costing £4,787 19*s.* 9*d.*, and drafts for that large sum with bills of lading. Those drafts are honored without objection, and the whole price of the lost cargo is duly paid. That the payment was imperative on the purchaser, notwithstanding the loss of the goods if they were taken at his risk, is apparent from *Castle* v. *Playford* (1); *and if I am right in considering that they were so taken, he was bound to pay, and is, therefore, entitled to recover. 745]

Of course the correspondence and its result occurring after the loss cannot be taken as decisive, and are open to the observation made at the bar, that the payment was voluntary, and was intended to shift the liability from the vendor to the underwriters. But I see no reason to doubt that it was perfectly *bona fide*, and was made because, on all hands, it was assumed that the purchaser was liable to make it, and would have full indemnity for his loss from the insurers. The insurers themselves do not seem, as I have already pointed out, to have doubted the justice and legality of the claim upon them if it should be proved that the loss had been caused by the perils of the seas. On this point only did they raise any controversy, and the denial of the insurable interest of the plaintiff was an afterthought. So that there was, immediately after the accident, a *consensus* of all concerned—the vendor, the purchaser, and, so far as we are informed, the insurer—that, according to mercantile understanding, the risk was with the plaintiff, and he had an insurable interest. If I saw any ground for supposing that there was trick or management in this part of the business, or any effort to shift unfairly responsibility for the loss, I should advise your Lordships to put these latter considerations out of account, if you should not rather use them to defeat the parties so offending; but I believe that there is no ground for any such impeachment, and if there is not, the instant demand and uncontested payment

(1) Law Rep., 7 Ex., 98.

are, in my mind, strong evidence of the real intention of the parties, and the true bearing and effect of their relations to each other.

I have come to the conclusion, concurring with my noble and learned friend who will follow me, that the decision of the Exchequer Chamber should be reversed.

LORD SELBORNE: My Lords, with respect to the cross appeal of the defendant, I believe all your Lordships are agreed that it should be dismissed with costs.

In the observations which I have to offer to your Lordships, I shall refer only to the principal appeal; that of the plaintiff—as *to which it is my misfortune to differ [746 from two of your Lordships, as well as from the majority of the court below;—my opinion being that this case was placed upon its proper ground by the judgment of Mr. Justice Quain in the Court of Exchequer Chamber.

It is, on all hands, admitted that if, by the contract between the parties, the rice was to be at the risk of the buyer during the time of its shipment at Rangoon, the plaintiff (the appellant here) was entitled to recover. I do not consider it necessary that this should have been expressed in the bought note; it is sufficient, in my opinion, if it appears by evidence proper to be considered by a jury, that the parties did in fact so agree. But I cannot read the terms of the bought note without drawing from them the inference (which there is certainly nothing in the rest of the evidence to repel), that the intention of the parties was that the goods should be insured by the buyer. I do not understand that the majority of the judges in the Court of Exchequer Chamber thought otherwise; but they were of opinion, that, as the time when the sellers, under the terms of the contract, would be entitled to draw upon the buyer for the price of the goods, and when the buyer would be bound to accept the goods in fulfilment of his contract, would not arrive until a full cargo had been put on board, the risk against which the buyer was intended to insure would commence at the same time and not earlier.

With this opinion I am unable to agree. The evidence satisfies me, as a matter of fact, that this was not the actual understanding or intention of the parties. On the next day after the contract, when there could be no object in shifting any burden from the right to the wrong party, the buyer did actually insure in terms which covered every bag of rice put on board from the first commencement of the loading of the vessel. The fact, that such an insurance had been made, seems not to have been then communicated to the sellers.

But they made no insurance; and on the 6th of March, 1872, when the vessel was in the Rangoon river, exactly three days before it began to take in cargo, they advised the buyer, by telegram, that the ship was there, and called his attention to "insurance." I cannot understand this otherwise than as meaning that the time was then close at hand 747] at which, *by the commencement of the loading of the cargo, the risk intended to be insured against by the buyer would begin. Nor does it appear to me to be reasonable, or according to the probable and ordinary course of mercantile usage, that when a cargo is to be loaded at a given place, on board a particular ship, for a particular adventure, and when the duty of insurance is undertaken by the buyer, the parties should be supposed to mean to divide the risk; so that the buyer should insure after the cargo is complete, and the sellers (though nothing is said about it) until that time. When we have once got so far as the direct evidence leads us in this case, the presumption appears to me to be against such a distinction, and the burden of proof to be upon those who affirm it.

Mr. Baron Bramwell (a judge whose opinions I always hold in the highest respect) considered it a sufficient answer to this that there might be a risk while the goods were on their way to, and yet not on board the ship, against which it would certainly not be for the buyer to insure; and the line must always be drawn somewhere. I cannot say that I am satisfied with that argument. The line in this case appears to me to be clearly drawn by the contract; whatever is within the scope of the contract is on one side of that line; whatever is not is on the other. The parties had of course in their contemplation the cargo of the ship and that only; and goods neither placed on board the ship as part of that cargo, nor subject to any maritime risks of that particular ship, as hired for that particular adventure (although they might be destined by their owner, possibly a different person from the seller, to fulfil a contract made by him for the loading of that vessel), would be altogether outside of this contract, and entirely unaffected by its provisions. But it is surely otherwise with goods put on board as part of the cargo, and subject to the maritime risks of the ship as hired for the particular adventure. The subject of the contract was "the cargo," not specific goods, nor a defined quantity of goods. Neither party contemplated the precise event which happened; both had in view the fulfilment of the contract by the loading and dispatching of a proper cargo. But they had both in view all ordinary maritime risks, and

also the necessity of *insuring against them, of which [748 the risk, while the ship lay in the river taking in its cargo, was undoubtedly one: and it is certain that the act of insurance as to that or any other part of the risks, was not, as between the buyer and the sellers, an element of the price to be paid by the buyer. Nothing could be less likely than that when the buyer undertook to insure, an insurance was meant which would not cover the whole risk of the adventure, from its commencement, as to every part of the cargo; or that they should have thought of such a refinement as that goods put on board for the purposes of the adventure were not to be regarded as "cargo" for the purpose of insurance until the whole loading was complete.

Baron Bramwell himself seems to have thought that the risk of damage by perils of the sea to any part of the cargo on board during the process of shipment might possibly fall upon the buyer, and be insurable by him, if only the rest of the cargo should be afterwards also put on board by the sellers. It is certainly very improbable that the sellers can have intended to be responsible for such a loss, though I doubt whether such an opinion as to the incidence of a partial loss so occurring during the shipment is consistent with the principle of the judgment under appeal. Be this as it may, the case so put of a partial loss followed by a completion of the shipment, confirms me in the opinion that the insurance contemplated and intended between these parties was one which would cover the whole maritime risk during the whole process of shipment. All the acts of the parties, from first to last (though I have not thought it proper to lay stress upon anything written or done after the loss had occurred), seem to me to be entirely consistent with this view, and with this view only, of their intention and agreement.

So understanding the agreement of the parties as to insurance, I think it is sufficient for the decision of this case: "Merchants," said Mr. Justice Blackburn, when delivering his opinion in the case of *Allison* v. *Bristol Marine Insurance Company*, lately before this House (1), "according to my experience, attach very great weight to a stipulation as to who is to insure, as showing who is to bear *the [749 risk of loss." I agree in that remark, which is confirmed by several authorities. I think that it ought to be inferred, from the evidence of the understanding and intention of the parties as to insurance, in this case, that the buyer was to bear the risk of loss, as much as in *Castle* v. *Playford* (2).

This renders it in my judgment unnecessary to determine

(1) 1 App. Cas., at p. 229. (2) Law Rep., 7 Ex., 98.

some other questions, which were very ably discussed during the argument at the bar, and which, if the case were to depend upon their solution, might be attended with greater difficulty. I agree with the Court of Exchequer Chamber, that, if the plaintiff had no insurable interest in the rice on board at the time of the loss, he could not acquire such an interest by any act or election afterwards. But, whether the shipment of the additional quantity of rice necessary to complete the intended cargo was "a thing to be done by the seller for the purpose of putting the quantity already shipped into a deliverable state," within the meaning of the doctrine explained in *Gilmour* v. *Supple* (1), and illustrated by *Rugg* v. *Minett* (2), *Aldridge* v. *Johnson* (3), and *Langton* v. *Higgins* (4): whether the shipment of the whole quantity intended to complete the cargo was a condition precedent to the vesting in the buyer of property in any part of it, and to his liability to pay for the part actually shipped, within the principle of *Appleby* v. *Myers* (5) and the cases which preceded it: or whether (as the Court of Common Pleas seems to me to have thought), the delivery of each bag of rice into the ship specially designated for that purpose by the contract had the effect of vesting the property in the plaintiff, subject to his right to reject it, if the cargo were not duly completed; these are the points as to each and all of which it is possible that one conclusion might be right, if there were no ground for holding that the risk of loss during shipment was undertaken by the buyer, and another, if the buyer did undertake that risk.

Inasmuch, however, as some of your Lordships take a different view (which, in case of an equality of voices, must 750] prevail), I think *it proper to add, that very little, if any, light, appears to me to be thrown upon this case by the authorities cited for the respondent; the doctrine of *Gilmour* v. *Supple* (1) having certainly in view some act to be done to the goods directly in question, and not merely the addition to them of a farther quantity of exactly similar goods; and *Appleby* v. *Myers* (5) being only one of those numerous authorities which show how the application of general rules may be varied by the special terms of particular contracts.

It is, in my view, enough for the purpose of the present decision, to find that the rice on board was, by the agree-

(1) 11 Moo. P. C., 551.
(2) 11 East, 210.
(3) 7 El. & Bl., 885.
(4) 4 H. & N., 402.
(5) Law Rep., 2 C. P., 651.

ment of the parties, at the plaintiff's risk when the loss happened; and, being of that opinion, I think that the judgment of the Court of Exchequer Chamber ought to be reversed; and I confess I very much regret the contrary decision, which will pass in the name of your Lordships' House, as a failure of what seems to me substantial justice.

THEIR LORDSHIPS being equally divided, the rule *Semper presumitur pro negante* applied, and the appeal was ordered to be dismissed.

LORD SELBORNE: My Lords, I do not know whether the rule *semper presumitur pro negante* applies to costs. I should have thought that that rule, if it did apply, would be against the motion for costs.

LORD CHELMSFORD: In general, as far as I recollect, when a judgment or decree is affirmed or reversed in this House, the result determines whether there shall be costs or not. I remember a case perfectly well—I think it was the case of *Hopkinson* v. *Rolt* (1)—when Lord Campbell was Chancellor, and when he and Lord Cranworth and myself sat. The Lord Chancellor and myself were for affirming the judgment, and Lord Cranworth was for reversing it. Upon the question of costs Lord Campbell (the Lord Chancellor) said that he thought that as there was a difference of opinion there ought to be no costs; but Lord Cranworth, with that candor *which always distinguished him, said, that [751 he thought the rule was that the result determined whether there should be costs or not, without regard to any difference of opinion. I am quite in your Lordships' hands as to whether there shall be costs in this case or not.

LORD SELBORNE: My Lords, I am far from saying that in this case the noble Lord and myself who took a different view from the rest of your Lordships may not be induced by the consequence which would follow from that rule to withdraw our voices, and so admit of a majority in favor of the motion which my noble and learned friend has made. What I ventured to say was that the rule *semper presumitur pro negante* as applied to the motion that certain parties should pay costs, would rather go against that motion. The case my noble and learned friend has referred to was not a case of an equal division of opinion in your Lordships' House, but a case of a majority. However, if my noble and learned friend opposite (Lord Hatherley) also thinks that this is a case which ought to carry costs, I shall not be at all disposed to press my opinion.

(1) 9 H. L. C., 555.

LORD CHELMSFORD: I should like to hear what your Lordships think should be done in this peculiar case with regard to costs.

LORD O'HAGAN: There must be precedents. The same equal division of opinion occurred in the case of *The Queen* v. *Millis* (1) and in the *O'Connell Case* (2).

LORD CHELMSFORD: I may remind my noble and learned friend that *The Queen* v. *Millis* was a criminal case.

LORD HATHERLEY: I think, technically, my noble and learned friend opposite (Lord Selborne) may be right in saying that the rule, *semper presumitur pro negante*, would involve the contrary, with regard to costs, from what it does 752] with regard to the original *order as the reversal of a judgment. But I would put to my noble and learned friend what takes place upon dismissing an appeal as guiding us upon this point. The question is put "that the appeal be dismissed;" if the rule *semper presumitur pro negante* were applied in that case the appeal must be hung up forever. This case must certainly have occurred before.

LORD SELBORNE: It is not worth while pursuing it farther. If my noble and learned friends both think that costs ought to be given, I shall not vote the contrary; but still, as far as the rule is concerned, I should have thought that when the House had voted that the judgment be not reversed, the dismissal of the appeal would only follow as a necessary consequence of that.

LORD HATHERLEY: I can assure my noble and learned friend that I do not speak with any confidence in my own opinion upon this matter of costs; but I simply say as regards the common rule, that I do not see anything to take this case out of the common rule, that where the judgment complained of is not reversed, the appeal fails.

LORD CHELMSFORD: Perhaps it would be better, under the circumstances, that the appeal should be dismissed without costs; that is to say, nothing should be said about costs.

Judgment affirmed; and appeal dismissed.

MORICE v. ANDERSON (*Cross Appeal*).

LORD CHELMSFORD: My Lords, this is a cross appeal, by the underwriter of the policy of insurance issued to the appellant, in the case just disposed of. The underwriter,

(1) 10 Cl. & F., 534. (2) 11 Cl. & F., 155.

in answer to the claim of the assured upon the policy, pleaded that the vessel was not seaworthy. The only question argued in the courts below was whether there having been *prima facie* evidence of the unseaworthiness of the vessel, there was sufficient counter evidence of facts to make it a *fair question for the jury whether the [753 vessel was lost by the perils of the seas. All the judges in the courts below were of opinion, that the evidence was sufficient to warrant the finding of the jury. The two appeals being heard together, the argument at your Lordships' bar was almost entirely confined to the appeal of Anderson, and the question of his insurable interest. Scarcely anything was said upon the question of seaworthiness, and certainly nothing to impeach the judgment of the judges, or to show that the evidence upon which the jury proceeded was insufficient.

I therefore submit to your Lordships, that the judgment of the Court of Exchequer Chamber ought to be affirmed: and this appeal be dismissed with costs.

Judgment of the Court of Exchequer Chamber affirmed, and appeal dismissed, with costs.

Lords' Journals, 27th July, 1876.

Solicitors for the appellant in the original appeal, and respondent in the cross appeal: *Parker & Clarke.*

Solicitors for the respondent in the original appeal, and appellant in the cross appeal: *Hollams, Son & Coward.*

[1 Appeal Cases, 754.]

H.L (E.), Nov. 21; Dec. 1, 1876.

[HOUSE OF LORDS.]

*THE REV. THOMAS RADLEY and HENRY BRAMALL, Appellants; and THE DIRECTORS OF THE LONDON AND NORTH WESTERN RAILWAY COMPANY, Respondents (1). [754

Negligence—Contributory Negligence—Misdirection.

Though a plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident which is the subject of the action, yet, if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.

A railway company was in the habit of taking full trucks from the siding of a colliery owner, and returning the empty trucks there. Over this siding was a bridge eight feet high from the ground. On a Saturday afternoon, when all the colliery men had left work, the servants of the railway ran some trucks on the siding. All

(1) Reversing 12 Eng. Rep., 544, and affirming 8 Eng. Rep., 516.

but one were empty, and that one contained another truck, and their joint height amounted to eleven feet. On the Sunday evening the railway servants brought on the siding many other empty trucks, and pushed forward all those previously left on the siding. Some resistance was felt, the power of the engine pushing the trucks was increased, and the two trucks, the joint height of which amounted to eleven feet, struck the bridge and broke it down. In an action to recover damages for the injury, the defence of contributory negligence was set up. The judge at the trial told the jurors that the plaintiffs must satisfy them that the accident happened solely through the negligence of the defendants' servants, for that if both sides were negligent, so as to contribute to the accident, the plaintiffs could not recover:

Held, a misdirection, and a new trial ordered.

THIS was an appeal against a decision of the Court of Exchequer Chamber.

The appellants were the plaintiffs in an action brought in the Court of Exchequer, in which they claimed to recover damages for the destruction of a bridge occasioned, as they alleged, by the negligence of the defendants' servants. The plaintiffs were owners of the Sankey Brook Colliery, in the county of Lancaster, which was situated near a branch line of the defendants' railway. There was a siding belonging to the plaintiffs, which communicated with the railway, and the defendants' servants were in the habit of taking 755] *trucks loaded with coals, from this siding, in order to run them on the railway to forward them to their destination, and also of bringing back empty trucks and running them from the railway on to the siding. On Saturday after working hours, when all the colliery men had gone away, the defendants' servants ran some of the plaintiffs' empty trucks from the railway upon the siding and there left them. In that position they remained. One of the watchmen employed by the plaintiffs knew that they were there, but nothing was done to remove them to a different place. In the first of these trucks had been placed a truck which had broken down, and the height of the two trucks combined was nearly eleven feet. There was, in advance of the spot where the trucks had been left, a bridge placed over a part of the siding, the span of which bridge was about eight feet from the ground. On Sunday afternoon the defendants' servants brought a long line of empty trucks belonging to the plaintiffs, and ran them on the line of the siding, pushing on the first set of trucks in front. Some resistance was perceived, and the pushing force of the engine employed was increased, and the result was, as the two trucks at the head of the line could not pass under the bridge, they struck with great force against it and broke it down. For the damage thereby occasioned this action was brought. The defence was, contributory negligence; it being insisted that the plaintiffs ought to have

moved the first set of trucks to a safe place, or at all events, not to have left the truck with the disabled truck in it so as to be likely to occasion mischief. At the trial before Mr. Justice Brett, at the Summer Assizes at Liverpool, in 1873, the learned judge told the jury that "You must be satisfied that the plaintiffs' servants did not do anything which persons of ordinary care, under the circumstances, would not do, or that they omitted to do something which persons of ordinary care would do . . . . It is for you to say entirely as to both points, but the law is this, the plaintiffs must have satisfied you that this happened by the negligence of the defendants' servants, and without any contributory negligence of their own, in other words that it was solely by the negligence of the defendants' servants. If you think it was, then your verdict will be for the plaintiffs. If you think it was not solely by the negligence of the defendants' servants, *your verdict must be for [756 the defendants" (1). The jurors having, on this direction, stated that they thought there was contributory negligence on the part of the plaintiffs, the learned judge directed that the verdict should be entered for the defendants, but reserved leave for the plaintiffs to move.

A rule having been obtained for a new trial, it was after argument before Barons Bramwell and Amphlett made absolute (2). On appeal to the Exchequer Chamber the decision was, by Justices Blackburn, Mellor, Lush, Brett, and Archibald (*diss.* Justice Denman) reversed (3). This appeal was then brought.

Mr. *Herschell*, Q.C., and Mr. *Baylis*, Q.C., for the appellants, the plaintiffs below: There was no ground here for saying that there had here been contributory negligence, and the form in which that matter was left to the jury constituted a misdirection. There was no obligation on the plaintiffs to move the trucks which the defendants' servants had put upon the siding from that place to another, and certainly none for the plaintiffs to summon their workmen on the Sunday to do so. They were not bound to assume that the defendants' servants would bring the empty trucks on the Sunday evening, and then push them on the siding in a negligent manner, taking no care how they were driven, nor even stopping when an obstruction was perceived, but pushing on with greater force than before to overcome the obstruction. But, unless the plaintiffs were

(1) Printed papers in the case. (2) Law Rep., 9 Ex., 71.
(3) Law Rep., 10 Ex., 700.

bound to assume all this, and to act on that assumption, there was nothing whatever that could be construed into contributory negligence on their part.

Even if there had been any negligence on the part of the plaintiffs, which was denied, it would not affect this right of action, unless it was such negligence that, but for it, the effect of the negligence on the part of the defendants might have been avoided.

Bridge v. *The Grand Junction Railway Company* (1), *Davies* v. *Mann* (2), *Tuff* v. *Warman* (3), and *Walton* v. *The London and Brighton Railway Company* (4) were cited and relied on.

757] *Mr. *Aspinall*, Q.C., and Mr. *McConnell*, for the respondents: There was clearly here negligence on the part of the plaintiffs, and but for that negligence the accident might have been avoided; whether that was so or not was a proper question for the jury. The plaintiffs knew of the trucks being brought on the Saturday afternoon; they knew that one of those trucks was disabled, and that that disabled truck was placed on another truck, and that the two together could not pass under the bridge. This was knowledge of facts relating to their own property. They ought to have removed the disabled truck; to leave it where it was they knew to be dangerous, yet they left it there, being quite well aware that in the ordinary course of business other trucks would be brought on the line and might be pushed against it. *Bridge* v. *The Grand Junction Railway Company* (1) distinctly established that if the plea had shown that by ordinary care on the part of the plaintiff the consequences of the defendants' negligence might have been avoided, it would have proved an answer to the action. There could be no doubt that that was the case here, and the pleadings here had distinctly raised that defence. *Tuff* v. *Warman* (3) was a case of collision, but even there Mr. Justice Wightman, in delivering the judgment of the Court of Exchequer Chamber, said: "The proper question for the jury is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have hap-

(1) 3 M. & W., 244.
(2) 10 M. & W., 546.
(3) 5 C. B. (N.S.), 573; 27 L. J., C. P., 322.
(4) 1 Har. & Ruth., 421.

pened." In *Davies* v. *Mann* (1) the rule of law is stated to be, that the plaintiff may recover unless by the exercise of ordinary care he might have avoided the consequences of the defendant's negligence. Applying that doctrine to this case, it was clear that but for the want of ordinary care and caution on the part of the plaintiffs the misfortune here might have been avoided. The direction, therefore, was right, and the verdict of the jury on this point, and the judgment of the Exchequer Chamber, ought to be sustained.

*Mr. *Herschell* replied. [758

LORD PENZANCE: My Lords, the action out of which this appeal arises is an action charging the defendants with negligence (through their servants) in so managing the shunting of some empty coal wagons as to knock down a bridge and some staging and some colliery head-gearing, which stood upon it, and belonged to the plaintiffs.

The first question on the appeal is, whether the Court of Exchequer Chamber was right in holding that there was any evidence, proper to be submitted to the jury, tending to the conclusion that the plaintiffs themselves had been guilty of some negligence in the matter, and that such negligence had contributed to produce the accident and injury of which they complained.

The general facts of the case, the particular facts which gave rise to the imputation of negligence, and the contention of both sides as to the fair result of these facts, are stated in the judgment of the Court of Exchequer delivered by Baron Bramwell. [His Lordship here read the statement from Mr. Baron Bramwell's judgment (2).]

It may be admitted that this is a fair and full statement of the arguments and considerations on the one side, and on the other, upon which the question of the plaintiffs' negligence had to be decided. But it had to be decided by the jurors, and not by the court, and I am unable to perceive any reason why the learned judge did wrong in submitting these arguments and considerations to their decision accordingly. The bare statement of them is enough to show that there were in the case facts and circumstances sufficient at least to raise the question of negligence, whether they were a sufficient proof of negligence or not.

The decision, therefore, of the Exchequer Chamber upon this matter ought, I think, to be upheld.

The remaining question is whether the learned judge properly directed the jury in point of law. The law in these

(1) 10 M. & W., 546. (2) Law Rep., 9 Ex., at p. 72.

cases of negligence is, as was said in the Court of Exchequer Chamber, perfectly well settled and beyond dispute.

759] *The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident.

But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.

This proposition, as one of law, cannot be questioned. It was decided in the case of *Davies* v. *Mann* (1), supported in that of *Tuff* v. *Warman* (2) and other cases, and has been universally applied in cases of this character without question.

The only point for consideration, therefore, is whether the learned judge properly presented it to the mind of the jury.

It seems impossible to say that he did so. At the beginning of his summing-up he laid down the following as the propositions of law which governed the case: It is for the plaintiffs to satisfy you that this accident happened through the negligence of the defendants' servants, and as between them and the defendants, that it was solely through the negligence of the defendants' servants. They must satisfy you that it was solely by the negligence of the defendants' servants, or, in other words, that there was no negligence on the part of their servants contributing to the accident; so that, if you think that both sides were negligent, so as to contribute to the accident, then the plaintiffs cannot recover.

This language is perfectly plain and perfectly unqualified, and in case the jurors thought there was any contributory negligence on the part of the plaintiffs' servants, they could not, without disregarding the direction of the learned judge, have found in the plaintiffs' favor, however negligent the defendants had been, or however easily they might with ordinary care have avoided any accident at all.

The learned judge then went on to describe to the jury what it was that might properly be considered to constitute

760] negligence, *first in the conduct of the defendants,

(1) 10 M. & W., 546. (2) 5 C. B. (N.S.), 573; 27 L. J., C. P., 322.

and then in the conduct of the plaintiffs; and having done this, he again reverted to the governing propositions of law, as follows: "There seem to be two views. It is for you to say entirely as to both points. But the law is this, the plaintiff must have satisfied you that this happened by the negligence of the defendants' servants, and without any contributory negligence of their own; in other words, that it was solely by the negligence of the defendants' servants. If you think it was, then your verdict will be for the plaintiffs. If you think it was not solely by the negligence of the defendants' servants, your verdict must be for the defendants."

This, again, is entirely without qualification, and the undoubted meaning of it is, that if there was any contributory negligence on the part of the plaintiffs, they could in no case recover. Such a statement of the law is contrary to the doctrine established in the case of *Davies* v. *Mann* (1), and the other cases above alluded to, and in no part of the summing-up is that doctrine anywhere to be found. The learned counsel were unable to point out any passage addressed to it.

It is true that in part of his summing-up the learned judge pointed attention to the conduct of the engine driver, in determining to force his way by violence through the obstruction, as fit to be considered by the jury on the question of negligence; but he failed to add that if they thought the engine driver might at this stage of the matter by ordinary care have avoided all accident, any previous negligence of the plaintiffs would not preclude them from recovering.

In point of fact the evidence was strong to show that this was the immediate cause of the accident, and the jury might well think that ordinary care and diligence on the part of the engine driver would, notwithstanding any previous negligence of the plaintiffs in leaving the loaded-up truck on the line, have made the accident impossible. This substantial defect of the learned judge's charge is that that question was never put to the jury.

On this point, therefore, I propose to move that your Lordships should reverse the decision of the Exchequer Chamber, and direct a new trial.

*THE LORD CHANCELLOR (Lord Cairns): My Lords, [761 I have had the advantage of considering the opinion which has just been expressed to your Lordships in this case by my noble and learned friend, and, concurring as I do with every word of it, I do not think it is necessary that I should

(1) 10 M. & W., 546.

do more than say that I hope your Lordships will agree to the motion which he has proposed.

LORD BLACKBURN: My Lords, I agree entirely with the noble Lord who has first spoken as to what were the proper questions for the jury in this case, and that they were not decided by the jury. I am inclined to think that the learned judge did in part of his summing-up sufficiently ask the proper questions, had they been answered, but unfortunately he failed to have an answer from the jury to those questions, it appearing by the case that the only finding was as to the plaintiffs' negligence.

I agree, therefore, in the result that there should be a new trial.

LORD GORDON: My Lords, I entirely concur in the motion which has been submitted to your Lordships by my noble and learned friend on the other side of the House. The question is one which has given rise to some difficulty in the courts of Scotland, but I think that it is very likely that the opinion which has been expressed in this case will be regarded as a very useful authority for guiding their decisions.

Judgment of the Court of Exchequer Chamber reversed.

Judgment of the Court of Exchequer restored, and a new trial ordered, with costs.

Lords' Journals, 1st December, 1876.

Solicitors for the appellants: *Sharpe, Parkers & Co.*
Solicitor for the respondents: *R. F. Roberts.*

[1 Appeal Cases, 762.]

H.L. (Sc.), March 16, 1876.

[HOUSE OF LORDS.]

762] *BAIN *et al.*, Appellants; BRAND *et al.*, Respondents (1).

Heritable character of a Scotch Lease.

A lease in Scotland is heritable, not movable or personal, as in England, but descending to the heir of the lessee. Whether the lease be in perpetuity or for a term of years the descent will be the same.

Machinery annexed to Leasehold—Fixtures.

When machinery has been annexed to the leasehold soil for the working of coal underneath, it descends with the soil to the heir of the lessee.

Per THE LORD CHANCELLOR (2): There is certainly no authority for saying that the executor can remove fixtures as against the heir.

(1) Reversing 2 Court of Sessions Cases, 4th series, vol. 2, p. 256. (2) Lord Cairns.

THE material facts of this case are fully stated by the Lord Chancellor in his Lordship's address to the House. The question was whether certain machinery erected and used in a colliery by the lessee thereof under a lease for nineteen years, had become a fixture descendible to his heir; a lease in Scotland being heritable, and not personal, as in England.

The Lord Ordinary (1) held that "machinery attached or specially dedicated to the use of the leasehold property was heritable, and went with the lease to the heir, and not to the executor."

The Second Division of the Court of Session recalled the Lord Ordinary's interlocutor, and "in lieu thereof found that all the machinery therein referred to was to be considered as movable (personal) in a question as to the tenant's succession" (2).

Against this judgment of the Second Division the present appeal was tendered to the House;

Mr. *John Pearson*, Q.C., and Mr. *Mackintosh* (of the Scotch bar), appearing for the appellants; and

Mr. *Cotton*, Q.C., and Mr. *Bryce* for the respondents.

At the close of the argument the Law Peers delivered the following opinions:

THE LORD CHANCELLOR (3): My Lords, we have now to dispose of this appeal which was *argued before [763 your Lordships a few days since with very great ability.

Robert Brand, the elder, was the lessee during his life of a colliery in Cambusnethan; he held it on a lease for nineteen years beginning in 1867. When I say it was a lease of a colliery, it was in point of fact a lease in certain seams of coal, with a right of the ordinary description to occupy such portions of the surface as from time to time he might find necessary for the purpose of working the colliery; and then as he occupied portions of the surface they were to be taken into account and rent paid for them at so much an acre. Robert Brand, the lessee, died in 1873, having made a trust disposition under which all his heritable and movable property went to Robert Brand the younger, his son; and the lease, being, as your Lordships are aware, by the law of Scotland a heritable subject, would pass under the category of property which was heritable. Now this Robert Brand, the younger, in his turn died, and he died under the age of twenty-one years. He made a disposition which, according to the law of Scotland, it has been assumed would carry his movable property, but would not carry the heritable

(1) Lord Shand. (2) 4th Series, vol. ii, p. 258. (3) Lord Cairns.

subjects. The appellants represent the heir of this Robert Brand, the younger, who has also since died; the respondents, on the other hand, represent the trustees of the disposition to which I have referred.

My Lords, the precise issue which arises in the present suit is stated in certain articles of agreement for a settlement of the questions which had arisen between them,—"first, that the whole heritable property including the lease of the Green Head Colliery, shall be assigned, conveyed, and made over by the first parties as trustees foresaid to the second parties as trustees foresaid;" that is, it was agreed to assign and make over to the appellants the whole heritable property. My Lords, in deciding under this agreement what is the heritable property, the question arose as to certain fixed machinery, which had been set up by Robert Brand, the elder, the original lessee. Lord Shand described this machinery in the following manner:

> In regard to the machinery and plant including rails which belonged to the deceased, Robert Brand, sen., and were used by him at or in connection with the colliery held on lease by him from Mr. Houldsworth: Finds that the machinery 764] *and plant and those parts thereof, are heritable and belong to the trustees of the late Alexander Brand, which were attached either directly or indirectly by being joined to what is attached to the ground for use in connection with the working and carrying away of the minerals, though they may have been fixed only in such a manner as to be capable of being removed either in their entire state or after being taken to pieces without material injury, including those loose articles which though not physically attached to the fixed machinery and plant are yet necessary for the working thereof, provided they be constructed and fitted so as to form particular machinery and not to be equally capable of being applied in their existing state to other machinery of the kind.

My Lords, these words are in fact taken from an order of your Lordships' House made sometime since in a case which came by appeal from Scotland, namely, *Fisher* v. *Dixon* (1), and it may be assumed that they are words which correctly describe the character of fixed machinery, if the appellants are entitled to machinery of that kind.

My Lords, from the decision of Lord Shand there was a reclaiming note, and the Second Division of the Court of Session recalled the interlocutor of the Lord Ordinary, and held in substance that this machinery did not belong to the appellants, but belonged to the respondents as trustees of the deed executed by the minor, upon the footing of the machinery being personalty or movable. The Lords of Session having heard counsel, "recall the second finding of the said interlocutor, and in lieu thereof find that all the machinery therein referred to is to be considered as moveble in a question as to the tenant's succession;" that is to say,

(1) 5 Dunlop, 775; Decisions of the Court of Session, 2d series, vol v, p. 775.

in the question as between the representatives of the tenant, the heir on the one hand and the executor on the other.

It is between those two different views that your Lordships have now to decide; and the argument before your Lordships has divided itself naturally into two points; in the first place there is the question whether this matter is not already covered by decision; and, secondly, if not covered by decision, what upon principle ought to be the view taken of it by your Lordships.

With regard to decision, it was contended at your Lordships' bar, and it appears to have been the opinion of the Court of Session, that the case of *Fisher* v. *Dixon* (1) decided the question. Now I have looked very carefully into that case, and I am *certainly of opinion that [765 it cannot be accepted as a decision upon this point. With regard to the issue in that case, and the decision upon it in the Court of Session, the question stood thus: There was a very large claim made as between the heir and the executor of a certain person who owned very large property, upon which he had put up fixed machinery for the purpose of trade. The great question in the case was whether the heir of that person should have the machinery, or whether the executor should have it. But there was a further question, which appears in point of magnitude and the value of what was involved to have been comparatively a very minute one, as to what should be said of machinery upon certain property which the deceased had not been the owner of but had taken upon lease, and with regard to the machinery upon the property which was taken on lease there is no doubt that the decision of the Court of Session was in form that it formed part of his executory, that is, it did not go to the heir.

But when your Lordships examine the circumstances under which that decision was arrived in the Court of Session, your Lordships will find this remarkable fact. There was very great difference of opinion expressed upon the subject by the learned judges. It did not form the staple and the principal part of their judgments, but the matter was referred to in a subsidiary part of the opinions which they expressed, and upon it, as I have said, there was very considerable difference of opinion. The finding of the Court of Session was in these terms.: "With regard to the 7th class in the said report" (which was the class of machinery upon the leasehold property), "erections made on subjects held under leases by the late Mr. Dixon, and which have been removed by the respondents at the termination of the said

(1) 5 Dunlop, 775; Decisions of the Court of Session, 2d series, vol. v, p. 775.

leases: Find that these are movable and subject to the claim of *legitim* on the part of the claimants." It appears, therefore, from this interlocutor that the machinery had actually been removed by the respondents, the executors, at the termination of the leases, and at the time of the litigation it would seem to have been in their possession. Still, no doubt, that finding would appear to have decided that the machinery was lawfully their property. But when your Lordships examine the case a little further, you find in the opinions of the consulted judges this important passage:
766] "And *further, in so far as regards such subjects under lease, on which the late Mr. Dixon, being the tenant only, made erections which he was entitled to remove at the end of the lease, which the respondent also admits may be included in the executory, we are of opinion that that machinery belonged to those who represented the executor."

My Lords, looking on the one hand to the great divergence of opinion expressed by the judges, and on the other to the final result of their deliberations, I am quite unable to accept this as a deliberate decision of the Court of Session, that under the circumstances of the case the machinery upon the leasehold property belonging to the deceased, would belong to the executor and not to the heir. It appears, I repeat, to have been a subsidiary and a minute point in the case, and the machinery upon the leasehold property appears ultimately to have been admitted by the heir to be properly included in the executory.

When the case came to this House by way of appeal, the appellants were persons representing the executory and not the heir. Of course it was not for them to raise, and they did not raise, any question upon this point, which had virtually been given by admission in their favor in the court below. The respondents, who had presented no cross appeal, could not raise the question, and therefore the question did not fall in any way to be decided by your Lordships. Some expressions of opinion, not very distinct in the report which we have of them, appear to have fallen from Lord Brougham and Lord Campbell, and to some extent from Lord Cottenham. I think it is unnecessary to put any precise construction upon those expressions, because I repeat the matter did not fall to be decided; but, as far as I can gather from those expressions of opinion, there certainly appears to have been an impression upon the minds of those noble and learned Lords that there might have been a question raised on the part of the respondent, which they

rather commended him for not having raised, by means of a cross appeal.

My Lords, the case therefore being, in my opinion, uncovered by any decision which has settled the law upon the subject, I have to proceed to look at it in point of principle. Looking at it in that way, I would remind your Lordships that there are, with regard *to matters of this kind, [767 which are included under the comprehensive term of "fixtures," two general rules, a correct appreciation of which will, as it seems to me, go far to solve the whole difficulty in this case. My Lords, one of those rules is the general well-known rule that whatever is fixed to the freehold of land becomes part of the freehold or inheritance. The other is quite a different and a separate rule;—whatever once becomes part of the inheritance cannot be severed by a limited owner, whether he be owner for life or for years, without the commission of that which, in the law of England, is called waste, and which, according to the law both of England and Scotland, is undoubtedly an offence which can be restrained. Those, my Lords, are two rules, not one by way of exception to the other, but two rules standing consistently together. My Lords, an exception indeed, and a very important exception, has been made, not to the first of these rules, but to the second. To the first rule which I have stated to your Lordships there is, so far as I am aware, no exception whatever. That which is fixed to the inheritance becomes a part of the inheritance at the present day as much as it did in the earliest times. But to the second rule, namely, the irremovability of things fixed to the inheritance, there is undoubtedly ground for a very important exception. That exception has been established in favor of fixtures which have been attached to the inheritance for the purpose of trade, and perhaps in a minor degree for the purpose of agriculture. Under that exception a tenant who has fixed to the inheritance things for the purpose of trade has a certain power of severance and removal during the tenancy. What extent of removal the executor of one who is not a tenant, but is a complete owner of the inheritance, may have as against the heir, whether in point of fact he has any right of removal at all, or any right to take more than that which really and properly considered was never fixed to the inheritance in a definite way, I need not stop to consider, because the case of *Fisher* v. *Dixon* (1) has clearly decided by the authority of your Lordships that fixtures of the kind now before your Lordships cannot be removed

(1) 5 Dunlop, 775.

by the executor of one who is complete owner of the inheritance.

Therefore your Lordships have upon the one hand the 768] rule as *laid down in the case of *Fisher* v. *Dixon* (1), that fixtures of the present kind cannot be removed by the executor as against the heir of the complete owner of the inheritance, and you have on the other hand the exception to which I have referred, that fixtures of this kind can be removed by the executor of a tenant, or by the tenant himself as against the landlord during the course of the tenancy. But your Lordships have here to consider an intermediate case between those two. You have not to consider the case of the person who represents the entire inheritance, but you have to consider the case not of the whole inheritance but of a heritable subject, namely, a lease which is heritable according to Scotch law, upon the ground included in which fixtures of the kind I have referred to have been erected: and you have to determine whether, the tenant having died, and the lease continuing, and the lease having passed to the heir, the executor has as against that heir a right to remove those fixtures. There is certainly no authority for saying that the executor can remove these fixtures as against the heir. In my opinion there is no principle in the rules which I have endeavored to express which can warrant that right of removal. These things which I have termed fixtures are *ex hypothesi* annexed to the inheritance at the time of the death of the tenant. Thereupon the heritable subject, namely, the lease, at once passes to his heir. What right has the executor, or how is that right founded, to come upon the heritable subject which has passed to the heir, and to strip it of those things which have become fixed to it? There is no doubt, *ex hypothesi*, a right to remove these fixtures as against the landlord, but who is the person to exercise that right? It is not a right in gross, it is not a right collateral to the ownership of the subject, it is a right which of necessity must be annexed to the ownership of the subject, and must be exercised by him who is the owner of the subject. But the owner of the subject is not the executor. The owner of the subject is the heir, and therefore, as it seems to me, your Lordships are obliged to consider the person to whom the subject itself has passed, and to hold the right which is annexed to that subject to be exercisable by that person, and by that person only.

My Lords, looking at it in another way, it is decided

(1) 5 Dunlop, 775.

already *by the case of *Fisher* v. *Dixon* (1), that the [769 executor cannot remove these fixtures as against the owner of the whole of the heritable subject. Upon what principle, therefore, is it that he could remove these fixtures as against him who is the owner of a part of the heritable subject? My Lords, every reason which was advanced in the case of *Fisher* v. *Dixon* (1) showing how strained, how improbable, how inconvenient it would be that there should be a right to strip the inheritance of fixtures of this kind put up for the better use of the inheritance, can equally be advanced against the inconvenience of stripping that which continues a heritable and enduring subject, and which is in the possession of the heir, of those things which are necessary for the convenient use of that subject.

Therefore, my Lords, without pursuing the subject further, I submit to your Lordships that upon principle it is impossible to justify the right of the executors in this case.

When I look at the grounds of the decision in the Court of Session I find them expressed in the opinion of Lord Gifford. Those grounds are two: In the first place, Lord Gifford considers the subject to be already decided by the case of *Fisher* v. *Dixon*. I have ventured to express to your Lordships a contrary opinion upon that point. Then, on principle, Lord Gifford gives the following reasons for arriving at the same conclusion:

> I take it to be perfectly fixed law, and it was not disputed on either side of the bar, that in leases of ordinary duration where the tenant erects fixtures solely for the purposes of his trade, these trade fixtures remain his property and cannot be claimed by the landlord as *partes soli*, as it is said they are movable in a question between landlord and tenant. *Syme* v. *Harvey* and other cases are illustrations of the application of this principle. Now it humbly appears to me that if trade fixtures do not go to the landlord they must of necessity remain the movable property of the tenant, and must remain movable, *quoad omnia*.

My Lords, this is the basis of the decision of Lord Gifford, and if this statement were correct I possibly should arrive at the same conclusion at which he has arrived. But, my Lords, there is, as it appears to me, a complete fallacy in this mode of stating the facts. Lord Gifford appears to assume that you are to determine at the moment the fixture is placed in the soil what is to be its destiny during the whole of the lease, and he asserts that it never *be- [770 comes attached to the inheritance so as to be capable of being called a part of the inheritance—that it remains *quoad omnia* movable and amongst the movables of the tenant. My Lords, it appears to me that that is an error; it does become attached to the inheritance. The fixture

(1) 5 Dunlop, 775.

does become part of the inheritance; it does not remain a movable *quoad omnia;* there does exist on the part of the tenant a right to remove that which has been thus fixed, but if he does not exercise that right it continues to be that which it became when it was first fixed, a part of the inheritance.

My Lords, that disposes of the whole case, with the exception of an argument which was raised, but which I think your Lordships will not consider, namely, whether there might not be a question of destination here as regards some of the articles brought upon the ground under lease. It appears to me that no such question arises. The interlocutor of the Lord Ordinary raises no question of that kind. It follows the wording of the order of this House in the case of *Fisher* v. *Dixon* (1), and it speaks of those things which are either attached to the inheritance or attached to what is attached to the inheritance. My Lords, it is only upon things of that kind that any order now made by your Lordships will operate, and no order that I shall propose to your Lordships will operate by treating any of this machinery as machinery destined to be attached to the inheritance.

My Lords, upon the whole I would propose to your Lordships to restore the interlocutor of the Lord Ordinary and to give to the appellants, what they should have had in the Court of Session, the expenses of the reclaiming note, and with that direction to remit the case to the Court of Session.

LORD CHELMSFORD: My Lords, the question to be determined upon this appeal is, whether certain machinery used upon a colliery held under lease is movable or heritable; belonging, if movable, to the respondents as trustees and executors of Robert Brand, jun., and, if heritable, to the appellants as trustees of Alexander Brand, the heir of Robert Brand, jun., and of his father, Robert Brand, sen.

771] *The machinery in question was erected by Robert Brand, sen., for the purpose of working the colliery, which he held under a lease for nineteen years. When the lease had eleven years to run, Robert Brand, sen., died, having made a trust disposition of all his estates, heritable and movable, under which it is admitted that his only son, then a minor, took a vested interest in the lease and machinery. Robert Brand, jun., survived his father for a few months, and died before attaining majority. He left a settlement which professed to dispose of all his estates heritable and movable.

(1) 5 Dunlop, 775.

Being a minor at the time of the settlement, it could not operate upon such parts of the estates as were heritable. A leasehold, by the law of Scotland, being realty, the lease of the colliery fell to the heir of the settlor. Whether the machinery went also to the heir with the lease, or passed under the trust disposition of Robert Brand, jun., depends upon whether in a case of succession it is in its nature heritable or movable.

A great part of the note of the Lord Ordinary and of the judgment of the Court of Session is employed in considering whether the question at issue between the parties had or had not been decided in the case of *Fisher* v. *Dixon* (1), first in the Court of Session, and afterwards upon appeal to this House. With respect to the decision of the House, the question of the right to fixtures erected for the purposes of trade upon a leasehold was not before it, there being no appeal against the interlocutor of the Court of Session upon this point.

I will not enter into an examination of the difference between the Lord Ordinary and the Court of Session as to how the opinions of the judges in *Fisher* v. *Dixon* (1) upon the question are to be reckoned. Assuming that a majority of them were in favor of the judgment that the tenant's fixtures were movable, there were circumstances connected with this finding which deprive it of much of its authority. The fixtures were of trifling value, and were therefore probably not much considered in the argument. This probability is greatly increased by the respondent having admitted, as stated by the consulted judges (Bell's Appeal Cases, p. 343), that the fixtures in question must be included in the executory. It is quite true, as stated by Lord Gifford, that "in *actually deciding a point of law the court never [772 do so upon mere admissions by counsel," but where an admission is made a court is not likely to examine the point so closely as when it is contested and fully argued. It is necessary to advert to the conflicting opinions of the Lord Ordinary and the judges of the Court of Session as to the application of *Fisher* v. *Dixon* (1) to this case, because Lord Gifford, at the close of his judgment, says he prefers to rest it mainly upon general doctrine which he thinks is fixed by *Fisher* v. *Dixon* (1), "that a mere tenant's trade fixtures in an ordinary case are movable *quoad* succession and descend to his executors."

The law as to fixtures is the same in Scotland as in England. The meaning of the word is anything annexed to the

(1) 5 Dunlop, 775.

freehold, that is, fastened to or connected with it, not in mere juxtaposition with the soil. Whatever is so annexed becomes part of the realty, and the person who was the owner of it when it was a chattel loses his property in it, which immediately vests in the owner of the soil, according to the maxim "*Quicquid plantatur solo solo cedit.*"

Such is the general law. But an exception has been long established in favor of a tenant erecting fixtures for the purposes of trade, allowing him the privilege of removing them during the continuance of the term. When he brings any chattel to be used in his trade and annexes it to the ground it becomes a part of the freehold, but with a power as between himself and his landlord of bringing it back to the state of a chattel again by severing it from the soil. As the personal character of the chattel ceases when it is fixed to the freehold, it can never be revived as long as it continues so annexed.

A question between landlord and tenant as to fixtures can rarely arise except with regard to the description of those which the tenant claims the right to remove. But the present question is between heir and executor, and depends upon the character of the fixtures whether they are part of the realty or not. The lease itself is admittedly realty. The fixtures were annexed to the soil by the owner of that realty. If he had been owner in perpetuity there 773] would have been no doubt that the fixtures *would have been part of the inheritance. Can it make any difference that he was owner for a limited period? He was as absolute owner of the realty during that period as if he had had it forever. The fixtures were annexed to the ground for use during the whole term of enjoyment of the heritable subject. There is nothing in the terminable character of the lease at different periods that can affect the question, for as long as it continues it preserves its heritable character. So the power reserved to the landlord to purchase the machinery at the end of the lease, though it might interfere with the right of removal as against the landlord, cannot have the effect of changing the heritable character of the fixtures.

Lord Gifford says "the only thing that can make the fixtures heritable is their annexation to the soil, but that would carry them to the landlord, to whom alone the soil belongs." But this is not quite accurate. The question arises at a time when the portion of the soil included in the lease of the colliery belongs to the lessee as owner of the realty as long as the term endures, and the landlord's right to the fixtures

does not arise till the termination of the lease. Adverting also to an argument stated by him to have been used to prove the heritable character of the fixtures, that they were fixed to the lease so as to go with it to the tenant's heir, Lord Gifford observes: "A lease is an incorporeal right, and it is difficult to follow what is meant by a fixture to a lease." If the argument was as represented, it was certainly incorrect, for the machinery was not fixed to the lease but to the subject of it, the colliery; nor do I comprehend what is meant by a lease being an incorporeal right—leases may be of incorporeal as well as of corporeal hereditaments, but a lease itself is neither corporeal nor incorporeal.

The conclusion at which I have arrived is that the lease of the colliery being realty, the annexation of machinery to the soil for the purpose of working it became an accessory to the principal subject and partook of its character; that Robert Brand, jun., might, if he pleased, have separated the fixtures from the soil and so made them part of his personal estate. But not having done so, they remaining attached to the ground, went as part of the realty to the trustees of Alexander Brand, the heir of Robert Brand, jun.

*I agree with my noble and learned friend that the [774 interlocutor appealed from ought to be reversed.

LORD O'HAGAN: My Lords, this case has been argued on authority and on principle. For the respondents it was contended, and the contention is sustained by the judgment of Lord Gifford, speaking for himself and his colleagues in the Court of Session, that the point in it was decided by that court in *Fisher* v. *Dixon* (1), in a final interlocutor which was the subject of appeal to and affirmation by your Lordships' House. On the other hand, the appellant insists that the interlocutor in question is not decisive, as being, in terms, inconsistent with the reported opinions of the learned judges who pronounced it, and to be accounted for only on the supposition that, in the single matter which affects the controversy before us, it was pronounced upon consent—that, in that matter, it was not presented for decision here by the appeal, and was not, in fact, dealt with at all by the judgment of this House; and that the question thus remaining open, it should have been, on principle, ruled against the respondents.

Certainly, the proceedings of the Court of Session in *Fisher* v. *Dixon* (1) are affected with much obscurity and difficult to be clearly understood. A great part of the conflicting judgments of the Lord Ordinary and Lord Gifford is

(1) 5 Dunlop, 775.

occupied with an enumeration of the judges who discussed and decided that case, and an elaborate detail of their individual opinions, with a view of showing that the majority favored the appellants and the respondents respectively. The Lord Ordinary comes to the conclusion that the greater number sustained the contention of the appellants. Lord Gifford reaches the very opposite conclusion, and declares his opinion to be that "the question has been decided" (the other way) "as authoritatively as any question can possibly be decided in Scotland, by a majority of the whole court." It is odd that able men, deliberately considering a series of judgments, could have so entirely differed as to their import and effect; and it is hard to decide with confidence between them. But this I may say, inclining rather
775] to the adoption of the view of the Lord Ordinary, *that the irreconcilable antagonism of such eminent persons may, perhaps, justify your Lordships in refusing to acknowledge the conclusiveness of the judgments, one way or the other, either in the Court of Session or in this House, as to the matter before you, and in looking beyond them to the principles on which your own independent decision should be based. For myself, I am content with this result, and I decline to count the numbers or to weigh judicial opinions which are open to such diversity of skilled construction.

Then, as to the interlocutor relied on by the respondents, it is no doubt unequivocal in its phraseology, and would be authoritative if the judgments which preceded it did not cast serious doubt upon it. But when this is so, and when, besides, we have clear proof that the respondent in *Fisher* v. *Dixon* (1) admitted that the erections which he was entitled to remove at the end of the lease might be "included in the executry,"—being, as has been shown, of small appreciable value,—we may, I think, concur with the Lord Ordinary,—even without holding, as he did, that the finding is directly contrary to the judgment of the majority of the judges,—that it proceeded upon admission, and does not increase the authority of the case. As to the appeal to the House of Lords, it is enough to say that the present question was not really raised by it. For the purpose of raising that question there should have been a cross appeal. As there was not, the House could not deal with it; and we cannot doubt, on reference to its ruling, that it carefully and expressly abstained from adjudicating on any point which it was not required to decide. So far as there is any indication of opinion by the learned lords who heard the appeal, it is

(1) 5 Dunlop, 775.

given in favor of the appellant here by Lord Campbell when he repudiates the distinction "attempted to be made between leasehold and freehold," which he holds entirely to fail, "when we bear in mind that by the law of Soctland the leasehold is realty and it goes to the heir."

I have satisfied myself that the question in this case is open and unconcluded by authority; and although I cannot accept the appellant's representation that the judgments in *Fisher* v. *Dixon* (1) are decisive in his favor, I think that, on principle, he is entitled to succeed, and that the machinery dealt with by the Lord Ordinary, *in a very [776 careful and guarded manner, goes to the heir and not to the executor. I can add little to the reasons which your Lordships have already heard in support of this opinion; but the case is important, and I shall say a few words.

There has been no dispute about the law, which is the same in England as in Scotland, and has been so from very early times, giving to the heir machinery fixed and attached to the soil. If the property had been, in this case, freehold, there could have been no controversy as to the application of the rule. The executor could not have been heard to contest the claim of the heir. But the property is leasehold; and, no doubt, in England, that rule would not have been applicable in the circumstances of this case. In Scotland, however, the heir takes the lease as he takes the feu; and the incidental right to fixtures which the latter would have given him, in my opinion, attaches to the former. The cases have not been distinguished in principle, and I know no authority showing that they should be differently dealt with, in this regard. The Scotch heir has property in the lease which is identical in kind with his property in the freehold, although they may vary in duration and degree. It was urged in the very able and learned argument of Mr. Bryce, that the leasehold gives him only an incorporeal hereditament, whilst the freehold clothes him with permanent ownership of the land. But surely in both cases the soil goes to him equally: in the one case by inheritance or assignment, in the other by demise; but, in both, he has the soil, and has it completely, for a time or forever, according to the nature of his interest; and any fixtures attached to it have precisely the same connection with it, and are equally a part of it, so long as his ownership endures. As between heir and executor, there seems to be no cause for holding that their destination should be diverse, or that the same old rule should not be applied indifferently to both. Settled

(1) 5 Dunlop, 775.

exceptions exist in the interest of trade and from the exigencies of social life, as between tenants for life or in tail and remaindermen, and as between landlords and tenants. But there is no ground for such a relaxation of the strict law, and there has been no such relaxation, in fact, as can avail the respondents in their attempt to abridge the rights of the heir when he succeeds to the leasehold as well as to the feu.

777] *The principle which underlies the rule of law has been properly said to be that machinery attached to the land follows it as its accessory in the case of the freehold—The land is heritable, and so are the fixtures; and why, having a like attachment, should not the machinery going with a leasehold which is heritable become accessorially heritable also? I see no sufficient reason, in the absence of authority, for holding it movable in one case and heritable in another.

I do not go into the argument which has been founded on policy, or into the illustrative cases which were discussed in the Court of Session. It suffices for me to say, that the presumptions arising as to the purpose of the tenant from his use of the fixtures on a property in which he has a limited and terminable interest, and the considerations as to the benefit of trade which have secured to him the exceptional privilege of removing those fixtures before the close of his tenancy, do not arise or apply as between executor and heir. They do not apply in reference to fixtures attached to the freehold, and as soon as we ascertain that a Scotch leasehold is heritable, they have as little application to it against the heir.

The law as to trade fixtures is well stated (as to cases of mortgage) by my noble and learned friends Lord Hatherley and Lord Selborne on an appeal before your Lordships during the past year, and the observations are of force with reference to the principle by which our judgment should be governed. "The law," said Lord Hatherley, "has held that trade fixtures may be, at any time during the limited interest which the owner of the lease may have, removed by him, yet if he do remove them during the lease he is held to have allowed them to pass to the owner of the reversion, because, and only because, they are attached to his reversion; and, if they are not removed as the law would have enabled the person to remove them during the lease, they must be considered to have returned at once and finally to the owner of the reversion. The doctrine therefore was that they were a part of the land during the time they remained attached, but that for the benefit of trade they might, during

the interest of that person who had only a partial interest in the land, be removed so long as he had that interest, although there was no power whatever given to them for the purpose of removal if he chose to allow the time to pass during which *he might have removed them, and so far severed them from the property" (1). [778

No doubt, as Mr. Cotton argued, the case of a mortgage, to which Lord Hatherley particularly referred, is not identical with that before the House. But these remarks are of general application in this country; and I do not, with great respect for the Lord Ordinary, concur with him that "the law of England does not afford any assistance in the decision of the present question, because leasehold property is in England movable estate in a question of succession." On the contrary, it seems to me that the leasehold in Scotland being heritable, as the freehold is in England, the heir, who is put for the purposes of succession in the same relation to both, should have, as to both, identical rights so far as the nature of the estate permits, and that, therefore, all the reasons on which the English law is based, and the conclusions which they warrant, are of force to secure to him those rights,—the executor in Scotland being deprived of the interest in chattels real which he enjoys in this country.

On the whole, I concur with the noble and learned Lords who have preceded me, that the interlocutor of the Lord Ordinary should be sustained. I shall only add a word as to the terms of it which have been the subject of controversy. It designates the machinery which it pronounces heritable, not by pointing to any catalogue of the parts of which it is composed, such as we have had before us, but by describing it as "attached either directly or indirectly by being joined to what is attached to the ground," for the use and in the manner which it indicates. And by that accurate description it anticipates and answers the argument which has been founded on the details of the catalogue and the report of Mr. Geddes (2). Your Lordships were asked to amend the interlocutor by putting the word "physically" before the word "attached," but I think any such amendment unnecessary. Attachment "to the ground" must mean "physical" attachment; and, if the preceding part of the sentence could have admitted of any doubt in this respect, the subsequent words, pronouncing as *also heritable loose articles which, "though not *physically* at- [779

(1) *Meux* v. *Jacobs*, Law Rep., 7 H. L. 490.

(2) Mr. Geddes was the mining engineer to whom a remit was made by Lord Shand, see 4th Series, vol. ii, p. 260.

tached" to the fixed machinery, are necessary for its working, put the meaning, as I conceive, by contrast, beyond all dispute.

Upon the whole, my Lords, I entirely concur in the proposition which has been submitted to your Lordships by my noble and learned friend the Lord Chancellor.

LORD SELBORNE: My Lords, I agree with the opinions your Lordships have delivered.

The lessee has right, during the term of the lease, to the whole heritable subject, including those things which have become accessions to that subject by being affixed thereto. So long as his estate under the lease continues, there is no more reason for regarding his interest in the fixtures as separate from his interest in the soil than if he were owner in fee simple.

Nor can it make any difference that, as against the landlord, who is the owner in fee simple subject to the lease, the lessee, who has during the term placed upon the subject fixtures severable without damage to the landlord, has the same right of severing and removing those fixtures which an owner in fee simple, during his lifetime, would have had. This is a right which, on the death of the lessee before any severance has taken place, passes to his successor in the estate: in England, to his executor, because there his executor succeeds to the lease; in Scotland, to his heir, because a lease for years is heritable in Scotland.

The authorities, except *Fisher* v. *Dixon* (1) in the Court of Session (which, for the reasons stated by my noble and learned friends who have preceded me, is an authority of no real weight to the contrary), are all consistent with this view. It is unnecessary to consider any distinctions which the law has introduced in favor of creditors, because there is no question with creditors in this case.

The interlocutor appealed from reversed; the interlocutor of the Lord Ordinary of the 4th August, 1874, restored; and the cause remitted back with a declaration that the reclaiming
780] *note presented *against the Lord Ordinary's interlocutor ought to have been refused with expenses; and that the expenses to which the respondents were found entitled, if paid by the appellants to the respondents, ought to be repaid.*

Agents for the appellants: *Holmes, Anton, Greig & White.*
Agent for the respondents: *William Robertson.*

(1) 5 Dunlop, 775.

See 13 Eng. Rep., 14 note; Hanley *v.* McDermott, Irish Law Rep., 9 Eq., 85.

As to the criterion of a fixture, how far the intent, method of use, etc., controls as between vendor and vendee and mortgagor and mortgagee, see

Illinois: Arnold *v.* Crowder, 81 Illinois, 56.

Iowa: O'Humwa, etc., *v.* Hawley, 44 Iowa, 57.

Maine: Pope *v.* Jackson, 65 Me., 165.

New Jersey: Van Keuren *v.* Cent. R. R., 38 N. J. Law, 166; Blancke *v.* Rogers, 26 N. J. Eq., 563.

New York: McRea *v.* Cent. Nat. Bank, 66 N. Y., 489, distinguishing several cases; Voorhees *v.* McGinnis, 48 N. Y., 278; Kinsey *v.* Bailey, 9 Hun, 452.

Ohio: Teaff *v.* Hewett, 1 Ohio St. R., 511.

Annexations, made by the owner, must be *presumed* to be made with the design of their permanent enjoyment in connection with the land, and as accessory to it: Arnold *v.* Crowder, 81 Ills., 60.

The following articles have been held as between landlord and tenant to be fixtures:

Conservatory: Gardner *v.* Parker, 18 Grant's (U.C.) Chy., 26.

Greenhouse: Gardner *v.* Parker, 18 Grant's (U.C.) Chy., 26.

Hot-house: Gardner *v.* Parker, 18 Grant's (U.C.) Chy., 26.

Manure: made partly from products of farm and partly from hay or grain drawn there: Bonnell *v.* Allen, 53 Ind., 130.

The following not:

Embossing press: Pope *v.* Jackson, 65 Maine, 162.

Engine and boiler: Prongney *v.* Gurney, 37 Upper Can. Q. B., 347.

Heaters, resting on brick and pipes for heating: Gardner *v.* Parker, 18 Grant's Chy., 26.

Planing machines, etc.: Voorhees *v.* McGinnis, 48 N. Y., 278; Rogers *v.* Brokaw, 25 N. J. Eq., 496.

Shelves, in a shop: Denholm *v.* Commercial, etc., 2 U. C. Q. B., 369.

A building may be erected by a tenant upon leased premises, and by agreement with the landlord held as personal property, and removed at the expiration of the term: Matzon *v.* Griffin, 78 Ills., 477.

As between mortgagor and mortgagee the following have been held to be fixtures:

Buildings: Matzon *v.* Griffin, 78 Ills., 477.

Machinery, in a factory: McRea *v.* Cent., etc., 66 N. Y., 489; Voorhees *v.* McGinnis, 48 N. Y., 278; Irish, etc., *v.* Mahony, Irish L. R., 10 C. L., 363; Thompson *v.* Vinton, 121 Mass., 139.

Scales, platform: Arnold *v.* Crowder, 81 Ills., 56.

Where the purchaser of land brought trespass against a railroad company for removing ties and rails therefrom, it was held that if the railroad was neither originally built upon the land for the use and benefit of the land, nor in anywise adapted to the uses to which the land could be put; and if the structure was not of a permanent character, but temporary, so that it could be easily moved upon the ground, and taken therefrom without any injury to the land, and it was not intended by the parties who built it and owned the land at the time it was built, that it should be appropriated to the use of the land, but simply to enable the railroad company to take the gravel from the land; the railroad would not be a fixture or appurtenance belonging to the land, but personal property. That, on the contrary, if the structure was permanent in its character, and could not easily be moved, or was so fixed to the land that it could not easily be moved without injury thereto, or was intended to be appropriated to the land for its use and benefit, and was adapted to any use or purpose to which the land could be put, then it would be real estate, and pass to the purchaser under his deed. Also that possession of the track by the railroad company was notice of its rights thereto: Van Keuren *v.* Central R. R., 38 N. J. Law, 166.

See also Lyon *v.* Green Bay, etc., 42 Wisc., 538.

As between mortgagor and mortgagee new machinery to replace old becomes a fixture; the mortgagor cannot, by any agreement with his partner, bind the mortgagee to treat the machinery as personalty: Thompson *v.* Vinton, 121 Mass., 139.

The sale of a mill and all the articles therein used does not include old ma-

chinery no longer used and replaced with new, though stored in the mill: Brule *v.* Dostater, 19 Lower Can. Jur., 112.

Where the evidence shows a sale of a portable engine, and a lot of old irons belonging to a saw-mill that had been burned, without showing upon whose land it was situated at the time of the sale, held the jury was warranted in finding it was personalty: Kennedy *v.* Clayton, 29 Ark., 270, 278.

Where the owner of personal property mortgages it by a chattel mortgage and then annexes it to the freehold so it passes as a fixture under a subsequent real estate mortgage, the chattel mortgagee has no remedy against the purchaser under the real estate mortgage, but only against the person who wrongfully converted the personal into real property: Voorhees *v.* McGinnis, 48 N. Y., 278; Ricketts *v.* Dorrell, 55 Ind., 470.

But see Kinsey *v.* Bailey, 9 Hun, 452; Shoemaker *v.* Simpson, 16 Kan. sas, 43.

An owner of personal property cannot, against his will, be deprived of the title to such property by having it attached, without his consent, to the real estate of another by a third person, where such personal property can be removed from such real estate without any great inconvenience, and without any substantial injury to the real estate: Shoemaker *v.* Simpson, 16 Kans., 43; Cochran *v.* Flint, 57 N. H., 514; Kinsey *v.* Bailey, 9 Hun, 452.

See Ricketts *v.* Dorrell, 55 Ind., 470.

Fence rails and stakes, though unlawfully taken and detained by a wrongdoer, when used by him in the construction of a fence upon his real estate, thereby become a part of such realty, and cannot be replevied by the owner as personal property.

When an article is made personal property, by being severed by a wrongdoer from the realty to which it first belonged, it may be replevied by the owner as long as its separate identity can be ascertained; but not after it has been united to and forms part of any realty: Ricketts *v.* Dorrell, 55 Ind., 470.

If the mortgagor, after foreclosure of the mortgage, remove a building from the land the purchaser may maintain replevin therefor: Matzon *v.* Griffin, 78 Ills., 477.

By severing the fixture it became personal property for which replevin, trover, or trespass, would lie: Voorhees *v.* McGinnis, 48 N. Y., 278; Meyers *v.* Marsh, 2 U. C. Q. B., 148; Ricketts *v.* Dorrell, 55 Ind., 470.

A town built a school house partly upon its own land and partly upon land to which it had no title. In a suit to enforce a mechanic's lien, held, that there was no lien upon the land to which the town had no title, or upon that part of the building covering it, upon the principle that an annexation to real estate by a wrongdoer passes the title to the annexation to the owner of the realty: Stevens *v.* Lincoln, 114 Mass., 476.

See Henderson *v.* Harris, 30 Upper Can. Q. B., 360.

So though consent to the annexation be shown: Dunstedler *v.* Dunstedler, 77 Ills., 580; Henderson *v.* Harris, 30 Upper Can. Q. B., 360.

It seems that if a stranger builds upon the land of another, supposing it to be his own, and the owner of the land remains wilfully passive, equity will not allow him to profit by the mistake; but if the stranger knows that the land upon which he is building does not belong to him, then the owner of the land may assert his legal rights, and take the benefit of the expenditures: Emerson *v.* Western, etc., 75 Ills. 176.

Where a shed had been erected by the widow and heirs, which was intended to become a part of the undivided estate, it was held that it was to be regarded as a part of it, and was subject to distribution with the rest by the Court of Probate: Way *v.* Way, 42 Conn., 53.

Under a lease for a term of years, which contains a provision that the lessor agrees, at the expiration of the term, to take the improvements at a valuation, and a stipulation that the lessee will deliver possession at the end of the term without more, the lessee has no lien upon the land leased, for the value of his improvements: Hite *v.* Parks, 2 Tenn. Ch., 373.

See Brown *v.* Lyddy, 11 Hun, 451.

Where a tenant had erected buildings upon the real estate of an infant he

was allowed to remove them, doing no damage to the realty, but the court refused to allow him out of the rents for any improvements made upon the premises: Tounsley *v.* Neil, 10 Grant's (U.C.) Chy., 72.

Where a railroad company appropriated land for a right of way without proceedings to condemn and assess damages or a grant from the owner, it was held in an action subsequently instituted under the statute by the company, to perfect its title and assess damages, that the measure thereof was the value of the land at the time of its appropriation, with interest thereafter: Daniels *v.* The C. I., etc., 41 Iowa, 52.

See Lawrence's Appeal, 78 Penn. St. R., 365.

That the owner of land permitted a railway company to enter upon it and construct its road, does not give the company title to the right of way, or estop him from maintaining an action of ejectment against it. Where a railway company appropriated a right of way without compensating the owner therefor, although damages had been assessed: Held, that ejectment would lie, but that execution for possession should not issue until the company had been granted a reasonable time, fixed by the court, in which to pay the assessed damages and interest thereon from the date of assessment at the rate of six per cent.: Conger *v.* The B. & S., etc., 41 Iowa, 419.

See also Lawrence's Appeal, 78 Penn. St. R., 365.

In a suit to stay waste and to prevent the removal of improvements, it is sufficient to allege that the plaintiff is the owner and entitled to the possession of the premises with the improvements, and that the defendant is in possession and threatens to destroy the improvements, and that he is insolvent and unable to respond in pecuniary damages.

Where a tenant is restricted to a particular use of the demised premises equity will generally restrain him from any other use of them, even though no irreparable injury be shown to result from such breach: Frank *v.* Bounnemann, 8 West Va. R., 462.

In trespass and trover against five defendants, for taking and converting a steam boiler, it appeared that one defendant, P., had nothing to do with the original taking, but that it had been placed in his yard by the others, or some of them, not acting in concert with him, and that he had afterwards refused to give it up to the plaintiff. At the trial the plaintiff's counsel declined to elect, but went to the jury against all the defendants, claiming exemplary damages, and a general verdict was rendered. The court held there was no joint conversion, ordered a new trial without costs, and refused to allow the verdict to stand against P. alone: Menton *v.* Lee, 30 Upper Can. Q. B., 281.

[1 Appeal Cases, 780.]

H.L. (Sc.), June 22, 1876.

[HOUSE OF LORDS.]

PHOSPHATE SEWAGE COMPANY, Appellants; MOLLESON, Respondent. (1)

Stay of Suit for the expected Decision of another Court refused.

Whether a court having ample authority to decide the matter brought before it should await the expected adjudication of another tribunal having only similar authority, is merely a question for the exercise of judicial discretion.

If there be any want of power in the court it may be well that the proceedings should be stayed in order that some other court which has the requisite power may adjudicate.

Per LORD SELBORNE: I am far from saying that there might not be cases in

(1) Affirming Scotch Cases, 4th Series, vol. 1, p. 840.

which a proceeding in a foreign court might be regarded as a satisfactory way of ascertaining the legal rights of parties; and the Scotch courts might very properly desire to ascertain the result of the foreign proceeding before determining the claim brought before themselves. But I can hardly conceive a greater miscarriage of justice than it would be, after a suit had been fought out to the end, if your Lordships were now to turn round upon a point of discretion and say the Court of Session must take into consideration what has been done in the English suit. There was no lack of materials in Scotland for the necessary purposes of justice.

THE Phosphate Sewage Company, of London, put in their claim for upwards of £70,000 against the bankrupt estate of Messrs. Lawson & Son, merchants in Edinburgh and also in London, on the ground of their having deceived the Phosphate Sewage Company into the purchase from the Government of San Domingo of an unproductive concession of guano on the Island of Alto Vela. The trustee (the above respondent) "pronounced a deliverance" rejecting the claim (1).

781] *The Phosphate Sewage Company appealed to the Lord Ordinary (Lord Shand) insisting, in the first place, that the proceedings in the Scotch sequestration should be stayed until judgment was obtained in a suit involving the same question and between the same parties in the English Court of Chancery. Secondly, that the trustees should be ordered to set aside a dividend to meet the appellants' claim; and, thirdly, that the "deliverance" of the trustee ought to be recalled. The Lord Ordinary (Lord Shand) repelled the first and second pleas; but allowed the parties a proof of their respective averments. The First Division affirmed this decision; the Lord President observing that the Court of Session was not to "demit its undoubted jurisdiction because the appellants had chosen to institute proceedings in the Court of Chancery; the system of bankruptcy in Scotland being at once the most economical and the most expeditious that had ever existed" (2).

Against this decision the Phosphate Sewage Company appealed to the House of Lords, having for their counsel Mr. *Napier Higgins*, Q.C., Mr. H. *Davey*, Q.C., and Mr. *Alexander Young*.

For the respondent, the trustee Mr. Molleson, Mr. *John Pearson*, Q.C., and Mr. *Locock Webb*, Q.C., appeared.

At the close of the argument on behalf of the appellant, the Law Peers, without calling on the respondent's counsel, delivered the following opinions:

THE LORD CHANCELLOR (3): My Lords, the circumstances attending the litigation in this case are undoubtedly some-

(1) 19 & 20 Vict. c. 79, ss. 127, 128. (2) Scotch Cases, 4th Series, vol. i, p. 840.
(3) Lord Cairns.

what peculiar, and have led to a length of argument to every portion of which it will not be necessary that I should now advert.

The firm of Lawson & Son carried on business in Edinburgh and in London; they became bankrupt in the beginning of the year 1873, and the trustee of the sequestrated estate was chosen in the manner usual in Scotland.

*My Lords, there is a bankruptcy in Scotland, the [782 assets to be administered are in Scotland, and the trustee, who is the guardian of those assets, is in Scotland. The persons who make a claim against those assets go to Scotland and make their claim in Scotland, and they do all that before any proceedings whatever are instituted in England. They are allowed a condescendence and they are allowed proof in Scotland. They may state any case which they have to allege upon their condescendence, and they may prove it upon their proofs. They have a diligence by which they can recover all the documents which are in the possession of the defenders; and, as we observe here, they have the advantage of examining the persons who are principally concerned in the transactions which are impeached.

My Lords, if in that state of things there is any want of power in the court of Scotland to adjudicate upon a case of this kind, then it may well be that the proceedings should be arrested or stayed in order that some other court which has the power may adjudicate upon the claim which is made. But is there any want of power in the Scotch court? The learned judges say there is not. The learned judges unanimously tell us that it is the common practice of the courts in Scotland, where a claim is made in a sequestration to constitute a debt or to constitute a liability to damages, to admit the party claiming to constitute that claim if he is able to do so. A full opportunity has been afforded to the parties here to constitute their claim. If they have not alleged in their condescendence as much as they have alleged in their bill in Chancery in England, it is their own act, and one for which no person but themselves is answerable. My Lords, I am bound to say that it appears to me that it would be casting upon the jurisdiction of the Court of Bankruptcy in Scotland, and upon the administration of the bankruptcy law in Scotland, a very considerable and a very grave reproach if your Lordships were to accede to the argument that there is any want of power in the Court of Scotland to adjudicate in a case of this kind.

But then it is said that there are other persons who are

parties in the suit in England, and that it is much more convenient that the matter should be adjudicated upon once for all in the presence of all parties. My Lords, I say; 783] in the first place, it would be a *very grave question whether the adjudication of the court in England would not be examinable in Scotland, so far, at all events, as the judgment of a foreign court is examinable. But I by no means accede to the proposition, at least as a self-evident proposition, that it is convenient to have this adjudication in the presence of all the parties concerned. Your Lordships have been told that the circumstances under which, upon a claim of this kind, proof is admitted in Scotland upon a bankruptcy, are extremely different from the circumstances under which it is admitted in bankruptcy in England. The court in England is asked to declare, not merely that Messrs. Lawson & Son are liable, but that there is to be a right to a particular proof against their trustee in a Scotch sequestration. How is the Court of Chancery in England to tell what is the course in Scotland with regard to proof, or what is the kind of proof which according to the Scotch law of sequestration ought to be allowed? The case against Messrs. Lawson, be it well founded or be it not well founded, is one which can be perfectly well separated from the case against the other parties who are said to be liable to the Phosphate Sewage Company; and I can see no reason why the case, if there is power in the Scotch court to adjudicate upon it, should not be adjudicated upon there. And I repeat I also see no reason to doubt that there is perfect power in the Scotch court to adjudicate upon it.

Therefore, my Lords, I submit to your Lordships that the first two pleas in this case entirely fail, and that the courts in Scotland were right, the Lord Ordinary in the first instance and the Court of Session afterwards, in holding that there was no ground for sisting the proceedings, and that the claim must be tried upon its merits.

Then, my Lords, upon the merits of the claim this other plea is alleged (the fourth):

The sale of the concession having been fraudulently made to the appellants' company by the said firm of Peter Lawson & Son, and individual partners thereof, for the purpose and in the circumstances condescended on, and the same having been annulled, the appellants are entitled to be reimbursed the sum paid therefor with interest, and the respondent should be ordained to admit the said claim accordingly.

The fifth plea of the appellants is:

The said concession having, to the knowledge of the said Peter Lawson & 784] *Son and individual partners, been at the date of the said sale liable to be forfeited, and having been subsequently declared void in respect of what

had occurred prior to the said sale, the appellants are entitled to have repetition of the purchase price paid by them, and they ought to be admitted as creditors accordingly.

Your Lordships will observe that those two pleas are both of them in terms founded upon what is alleged in the condescendence, and I have already referred to what is alleged in the condescendence, and submitted to your Lordships that it does not found a case for relief against Messrs. Lawson & Son.

My Lords, to what I have said I have very little more to add; but I must call your Lordships' attention to another circumstance connected with the case. On the materials before your Lordships I own that it appears to me that if there were not those objections to the claim of the Phosphate Company to which I have already referred, there would have to be considered another very serious objection arising from the delay which took place before any claim was made to rescind the contract in question. The contract is completed in the year 1871, I think in the month of May in that year; the claim to rescind it is made early in the year 1873. There are certain vague allegations as to the company's having been in ignorance; there is an allegation that what first came to their knowledge was a communication from the Government of San Domingo, which resulted in a notice or a threat to forfeit the concession. Now your Lordships find that from the middle of 1871, when the company was formed, when they either took possession or were entitled to take possession of the concession and the place where it was to be worked, until the date of this communication from the Government of San Domingo, the matter was in the hands of the Phosphate Company themselves. It was for them to take care that they kept alive the concession by exporting the necessary quantity of guano. There is no evidence that they might not have done so. There is no evidence whatever as to what the state of the island was or the quantity of guano or guanito that might have been obtained. In point of fact they did not, apparently, export the necessary quantity; but it would rather appear, from the communication to which I have referred from the Government of San Domingo, that their claim to forfeit the concession was as much for what had been omitted to be done *after the concession came into the hands of [785 the Phosphate Company as for anything that was omitted to be done before that time; and it would appear to me that the probability is that if the Phosphate Company had adhered to the terms of the concession from the time they

came into possession, no forfeiture of the concession whatever as against them would have been made.

But, my Lords, I want to know what is the justification given for the delay in making any claim? Everything which ought to have been known, or could have been desired to be known, with regard to the subject-matter, must have been in the hands of the agents of the Phosphate Company from the time that company was formed. The documents are alleged by the bill to have been handed to the agents of the Phosphate Company. Now, my Lords, it has been said at your Lordships' bar, No doubt the agents of the Phosphate Company knew this—the directors and the secretary and the other officers knew it; but (it is said) they were all more or less implicated in what has been termed the conspiracy, the scheme to defraud the company at large. My Lords, I find in the condescendence no allegation whatever of that kind, and I find upon this condescendence a perfect blank as regards any explanation of the delay between the middle of the year 1871, when the company was formed, and the beginning of the year 1873, when the claim to rescind this contract was made. Perhaps it is not necessary to ground any decision upon this delay, but, if it were necessary, it appears to me that the delay alone would be fatal to the case of the appellants.

My Lords, I have endeavored to avoid even the appearance of expressing any opinion whatever upon the litigation which has been proceeding in the Court of Chancery in England. That litigation is not in any way before your Lordships. We are called upon to pronounce an opinion upon the proceedings in Scotland, and upon those proceedings only. I say so because your Lordships were informed by the learned counsel at the bar that the proceedings in England are not yet terminated, but are, at all events in some respects, the subject of a rehearing or appeal. It is, therefore, most important that your Lordships should not be supposed, upon pleadings and evidence which is not before you, to give any opinion which might lead to misap-
786] prehension and *misconstruction elsewhere. The opinion which I have ventured to express is formed upon the Scotch pleadings in the sequestration and upon the evidence taken in Scotland, and upon that alone.

The advice which I shall offer to your Lordships is to affirm the interlocutors here complained of, and to dismiss the present appeal with costs.

LORD CHELMSFORD: My Lords, agreeing entirely with all that has been said by my noble and learned friend, the

few observations which I propose to add will relate solely to the question as to the refusal to sist the proceedings by the Court of Session.

The appellants, the Phosphate Company, proceeded under the Scotch sequestration to make a claim of a debt from the bankrupts' estate upon the ground of their being liable to damages for being parties to a fraudulent transaction by which the company were deceived into purchasing a worthless concession of a guano island in San Domingo. The trustee decided against the claim (1). The appellants appealed in regular course against the decision. The Court of Session considered all the circumstances of the transaction, and exonerated the bankrupts from being implicated in the fraud, and affirmed the trustee's deliverance.

The appellants assert that, the Court of Session being informed that there was a proceeding in Chancery in England to rescind the sale and to make the bankrupts and others liable in damages to the whole extent of the purchase-money, the Court of Session ought to have sisted the proceedings until the determination of the Chancery suit. The appellants hardly go the length of saying that the Court of Session was bound to sist the proceedings; but only that they should, in the exercise of a just and proper discretion, have done so. But, the court having regular possession of the proceedings, there was no reason why they should hold their hands until it should be known how the English court would deal with the suit before it. They were competent to decide whether the trustee had properly rejected the claim, and, fully examining the evidence and all the circumstances, they *determined that if there had been a fraud com- [787
mitted, there was no evidence to show that Messrs. Lawson were implicated in it, in which I think they came to a right conclusion. This certainly constituted a sufficient reason against remitting the case to another *forum*, and for affirming the deliverance of the trustee.

LORD SELBORNE: My Lords, I am of the same opinion.

I take it to be quite clear that the Scotch jurisdiction in a Scotch bankruptcy is exclusive, and that when in an act of Parliament provision is made, as it is made, for establishing claims, upon which the dividends cannot yet be uplifted according to law, that must *prima facie* mean according to the due course of law as that would be understood in the courts of Scotland. I am far from saying that there might not be cases imagined in which, from the nature of the subject in litigation, or other circumstances, a proceeding in a foreign

(1) Under the act of 19 & 20 Vict. c. 79.

court might be regarded by the courts in Scotland as a satisfactory way of ascertaining the legal rights of parties; as for example when, according to the nature of the contract between them, some foreign law was to determine those rights, it might in that case well be considered that the country whose law was in question would in its own courts be best able to inform the courts in Scotland of the proper application of their law to the facts of the case. Again, if a claim dependent upon a joint cause of action only against a bankrupt in Scotland, and other persons who were in England, and if there were pending a suit or action in England against those joint parties, some of whom would not be amenable to the Scotch jurisdiction, I am not prepared to say that the Scotch courts might not be proceeding in a very proper manner in desiring to see what the result of that action might be before proceeding themselves to determine the claim. But in any case, even if that course should be taken, and properly taken, the ultimate determination of the claim, with or without the benefit of the materials afforded by the adjudication of a foreign court, must be with the proper *forum* of bankruptcy in Scotland. At the most, therefore, it can be no more than a question of judicial discretion; and for my part I think the proposition one very difficult to fol-
788] low which the appellants are obliged to *advance, and which really is this: that where the demand, though several against the Scotch bankrupts, is made in respect of transactions in some of which they and others are implicated, and in others of which others perhaps and not they are implicated, but which are such as may be considered as against all the parties concerned in them, by an English court in an English Chancery suit, that on account of the very intricacy and number of the questions which from the nature and from the proceedings in the Court of Chancery in England may be combined in one suit, for that very reason it is more consistent with justice in a Scotch bankruptcy to sist the proof there until all the questions in the English Chancery suit against all the parties to that suit shall have been determined.

Now I will not undertake to say that no case may exist in which the Court of Session in Scotland, exercising a judicial discretion, might think fit to take that course; but I do say, that it is a proposition by no means self-evident, and not commending itself to my reason that on those principles of judicial discretion, as to which it is a miscarriage of justice not to follow them, the court in Scotland, being informed that there is a Chancery suit pending in England

against the trustee of a Scotch bankruptcy and a dozen or twenty other persons, involving such a number of issues as were in question here, are to delay the administration in bankruptcy as between all the persons interested in that administration in Scotland until that English suit has been brought to its conclusion. Happily we live in times in which, even if that proposition were advanced, it might still be hoped that the delay might not be more than two or three years, or perhaps four or five, if the matter were ultimately brought to this House for determination. But we all know that, if a proposition be sound in point of law, it must have been equally as sound thirty, or forty, or fifty years ago as it is at the present time; and I need not remind your Lordships of the length and nature of the delay which might have occurred in the winding-up of a Scotch bankruptcy if such proceedings had occurred then.

My Lords, I do not say that the Court of Session in Scotland might not, if they had thought fit, have delayed this proof, but in the exercise of such discretion as they have, they determined not *to do so. They determined [789 that the merits should be gone into upon regular pleadings and regular proofs before them, which has been done; and I can hardly conceive a greater miscarriage of justice than it would be, if, after a complete suit has been instituted and fought out to the end on pleadings and proofs in Scotland for the purpose of determining this question between these parties, your Lordships were now to turn round upon a point of discretion and to say, All that is to go for nothing; there ought to have been a sisting of the proceedings in the Court of Session: the Court of Session must take into consideration what has been done in the English suit; after being informed of the decision of English courts, which perhaps have not yet considered that suit, and ascertained whether or no those proceedings are final, they must then determine whether or not they are to bind them in Scotland, and whatever may be the result of any such consideration, all that has yet been done in Scotland is to go for nothing. My Lords, I am happy to find that none of your Lordships are of opinion that it is our duty to take that course. Then I come to the case upon the merits, and I entirely agree with your Lordships that we must deal with the facts before your Lordships *secundum allegata et probata*, as we find them upon this record. I am bound to say that, looking at the long inventory of the evidence, including a great number of documents which it has not been thought necessary to print in the printed case or appendix, I see no reason to suppose

that there was any lack of materials before the court in Scotland for the necessary purposes of justice.

Well, then, what is the case? The case, stated at the highest, is one of fraud. Now supposing fraud were established *prima facie* upon this evidence against other persons, and not against the Lawsons, could your Lordships come to the conclusion that the Lawsons were to be answerable for the fraud of others, unless they appeared to have personally derived a profit or benefit from that fraud? My Lords, I know of no principle on which, in a court of equity or in a court administering equity, such a conclusion could be arrived at upon the facts of this case. It appears to me that, if there was any fraud, the Lawsons are not shown to have participated in it or to have derived any benefit from it.

My Lords, I do not inquire what may be the rights of the 790] *parties in any other point of view than that which is raised by this condescendence; but I do say that, under these circumstances, it is impossible that a case of repetition can be made upon the footing of failure of consideration and disappearance of the subject-matter of the contract.

Interlocutors appealed from affirmed, and the appeal dismissed with costs.

Agent for the appellant: *John Holmes.*

Agents for the respondent: *Lawrence, Plews, Boyer & Baker.*

[1 Appeal Cases, 790.]

H.L. (Sc.), May 30, 1876.

[HOUSE OF LORDS.]

CLYDE NAVIGATION COMPANY, Appellants; BARCLAY *et al.*, Respondents (1).

Shipowner's Immunity under Licensed Pilotage.

Where a ship is under the compulsory charge of a licensed pilot the owners are not responsible for damage occasioned by his fault or incapacity; although they must meet and rebut any relevant allegation of negligence on their own part.

Per LORD CHELMSFORD: Under the Merchant Shipping Act, 1854, where shipowners have proved fault on the part of the pilot sufficient to cause, and in fact causing the calamity, they must be held to have satisfied the condition on which their exemption from liability depends; and they are not to be called upon to adduce proof of a negative character to exclude the mere possibility of contributory fault. But if, in course of the evidence, certain acts or omissions on the part of the crew come out, it will then be incumbent on the owners to show satisfactorily that those acts or omissions in no degree contributed to the damage.

Per LORD SELBORNE: When it is proved that a qualified pilot was acting in charge of the ship, that that charge was compulsory, and that it was the pilot's fault or

(1) Affirming Scotch Cases, 4th Series, vol. 2, p. 842.

incapacity which occasioned the damage; the burden of proving the defenders' contribution to the loss is cast on the pursuers. The defenders are not obliged to exonerate themselves by indefinite negation. They are, however, bound to rebut evidence actually brought against them of contributory negligence.

By the Merchant Shipping Statute, 1854 (17 & 18 Vict. c. 120), s. 388, it is enacted that no owner or master of any ship shall be answerable for any loss or damage occasioned by the fault or incapacity of any licensed pilot acting in charge of such ship within *any district where the [791 employment of such pilot is compulsory by law.

Under the Clyde Navigation Consolidation Act, 1858, s. 128, a board was established for licensing pilots to navigate vessels plying on the river; and it was ordered that no one should presume to pilot any ship or vessel exceeding 60 tons register other than pilots duly licensed by the board.

On the 19th of February, 1873, one of the above appellants' dredgers (of great value, known as dredger No. 3), moored in the Clyde, was run into by the respondents' new ship Colina, of 2,001 tons burthen, then on her trial trip in the river. Serious damage arose; and the action in the present case was brought to recover £6,000 in respect of the loss.

The defence was that the collision arose from no fault of the respondents or of their crew; but was occasioned entirely by the incapacity or error of the licensed pilot who had charge of the Colina, and whose authority was imperative in the Clyde district under the Merchant Shipping Act, 1854.

The appellants denied that the collision was caused by any fault of the licensed pilot, and they further asserted that the respondents themselves had contributed to the accident by the inattention and disobedience of the crew to the orders and directions of the licensed pilot, whom they were bound to obey. Much evidence was adduced on both sides; and the result was, that the Lord Ordinary (1) assoilzied the defendants (the above respondents), and the Inner House (Second Division), Lord Ormidale, dissenting, adhered to the Lord Ordinary's interlocutor, holding that no blame attached to the master or crew of the Colina, and that the accident was exclusively attributable to the licensed pilot in charge of her (2).

The Clyde Navigation Company thereupon appealed to the House, having for their counsel Mr. *Cotton*, Q.C., and Mr. *Benjamin*, Q.C., who contended that there was no sufficient evidence of fault or incapacity on the part of the pilot,

(1) Lord Mackenzie. (2) 4th Series Scotch Cases, vol. ii, p. 842.

and that the officers and crew had failed in adequately obeying his orders and directions.

792] *Mr. *Butt*, Q.C., and Mr. *Herschell*, Q.C., were heard for the respondents.

The following opinions were delivered by the Law Peers:

LORD CHELMSFORD: My Lords, the only question upon which there is any dispute in this case is, whether the owners of the Colina have done, or omitted to do, any act which contributed to the collision for which they are sought to be made answerable. Their defence is founded on the Merchant Shipping Act, 1854, which enacts that

> No owner or master of any ship shall be answerable to any person whatever for any loss or damage sustained by the fault or incapacity of any qualified pilot, acting in charge of such ship, within any district where the employment of such pilot is compulsory by law.

But although an accident may have been attributable originally to a pilot, yet, if any fault of the owner or master of the vessel has contributed to it, his responsibility still remains.

There has been some little confusion in the cases as to the *onus probandi*. In a case relied upon in the judgment of the court below, and mentioned in the argument at the bar —the case of *The Iona* (1)—Vice-Chancellor Kindersley is reported to have said:

> It is not enough for the owners to prove that there was fault or negligence in the pilot. They must prove to the satisfaction of the court which has to try the question that there was no default whatever on the part of the officers and crew of their vessel, or any of them, which might have been in any degree conducive to the damage.

The learned Vice-Chancellor imposes upon the owners a species of negative proof which it is impossible for them to give. If, instead of saying "they must prove," &c., he had said, "it must be proved that there was no fault on the part of the officers and crew," he would then have been perfectly correct.

The condition of exemption that the owners should prove that the accident arose entirely from the fault of the pilot, is one which must be fairly and reasonably interpreted. The owners having proved fault on the part of the pilot sufficient to cause, and in fact causing, the calamity, must therefore, in absence of proof of contributory fault of the 793] crew, be held to have satisfied the condition *on which exemption depends, and are not to be called on to adduce proof of a negative character, to exclude the mere possibility of contributory fault. It may be that in the course of the evidence of the owners to fix the responsibility

(1) Law Rep., 1 P. C., 426; Maclachlam on Merchant Shipping, p. 269.

soley upon the pilot, certain acts or omissions on the part of the crew may come out; and it will then be incumbent on the owners to show satisfactorily that those acts or omissions in no degree contributed to the accident.

There are certain facts which are clear in this case. The Colina was under the compulsory charge of Skelly, a licensed pilot, and he was the main cause of the damage which occurred, which is attributable to his improper steering of the vessel at the critical time when danger was imminent, when he appears not to have had complete command of himself. The original cause of the accident is beyond a doubt. Is the pilot then alone responsible, or were there any acts or omissions which contributed to the accident attributable to the owners or the crew of the Colina? This vessel had just been built, and had not been delivered by the ship builders to the owners, but was upon her trial trip on the Clyde, having on board three persons who afterwards became the master and the first and second mates, and a crew employed for the occasion consisting of twenty-five men. The first act of contributory negligence imputed to the owners is the having a crew of this description, and the by-laws of the Clyde Pilot Board are referred to, and the evidence of Skelly the pilot.

The by-laws require that:

> All steam vessels must be supplied with a captain or sailing master, who shall be an experienced seaman; and must also be manned with a sufficient number of able-bodied and experienced seamen for the safe navigation of the vessel.

The judges who were in favor of the defenders spoke disparagingly of this state of things. The Lord Justice Clerk says (1):

> The vessel was still the property of Barclay, Curle & Co., and she was manned on this her trial trip by officers and men who had no regular commission, but were there for the purpose of the trial trip. It is said that this is not sufficient compliance with the by-law. I think it was a slovenly state of matters, and not one to be commended.

And Lord Ormidale says (2):

> The evidence shows that the Colina was, as regards her officers and crew, in *a very deplorable condition—so much so that it is not in the least sur- [794
> prising that an accident occurred.

With respect to the by-law one can only observe that it was totally inapplicable to the present case. The Colina was still in the ship builder's hands, and therefore could not have any captain or sailing master, or an established crew of seamen. And this may account for what was observed by my noble and learned friend (3) in course of the argument, that no charge is made by the trustees of the Clyde

(1) 4th Series, vol. ii, p. 845. (2) 4th Series, vol. ii, p. 847. (3) Lord Selborne.

navigation (the authors of the by-laws) that there had been any fault by the non-observance of it. With respect to the constitution of the crew, it was necessarily one collected for the occasion, and could not consist of a master and officers strictly so called. There is no doubt that upon the trial trip of a vessel, although she cannot be officered and manned like a ship on a voyage, every provision must be made to navigate safely, and every precaution taken to avoid danger to other vessels. All that was necessary was that the pilot should be assisted by a sufficient crew to obey his orders and carry them out promptly and efficiently, and certainly so far as number is concerned there was a sufficient crew; for it appears that the Colina would, if properly manned, have a complement of sixteen men, whereas on the occasion of this trial trip there was no less a number than twenty-five. But, assuming any objection to arise from the constitution of the crew, the point to be established against the owner is that the accident was occasioned in some degree by this circumstance.

It was said that the accident was partly owing to the want of proper assistance given to the pilot. It is said that the master ought to have been on the bridge to advise the pilot. There was no master, as I have already observed, strictly so called; but there is no magic in the word "master," and it appears that Durie, who was to be one of the officers of the Colina, was on the bridge, and did what was necessary. It is further objected that the chief officer was not at the bow to repeat the pilot's orders; and it is said that if the chief officer had been there, the hawser of the tug would have been sooner cast off. But Skelly, the pilot, says expressly that he did not want assistance for hailing the tug. He says, "I did not require any assistance in signalling the 795] tug," and *he says in another part of his evidence that all his orders were obeyed.

Lord Ormidale (') sums up his objections to the conduct of the owners as contributing to the accident in these terms:

> I am of opinion that, in respect of want of promptitude in seeing that the order of the pilot to throw off the tug was carried into effect, and failure to keep a proper look-out, the defenders have failed to exonerate themselves.

Now, with regard to "the failure to keep a proper look-out," there is not the slightest evidence that there was not a look-out kept. With respect to "want of promptitude in seeing that the order of the pilot to throw off the tug was carried into effect," it is already answered by the part of the

(') 4th Series, vol. ii, p. 842.

pilot's evidence to which I have directed your Lordships' attention.

Under these circumstances I think your Lordships will be clearly of opinion that there is no ground for this appeal, and that the interlocutors appealed from ought to be affirmed.

LORD HATHERLEY: My Lords, I am entirely of the same opinion.

The law has been laid down, with, perhaps, a little want of his usual carefulness, by Vice-Chancellor Kindersley in the case of *The Iona* (1). I apprehend that the true rule, as was stated fairly enough by Mr. Benjamin, is that the mode of proof will be this: In order to exempt yourself, by virtue of the provisions of the statute, from that which is a general common law liability, you who desire the exemption must bring yourself within the provisions of the statute; and the burden is, therefore, thrown upon you of proving that the mischief was occasioned by the pilot. But the other side may prove that, although the mischief was occasioned in one sense by the bad management of the pilot, yet there was a default on the part of the owners of the ship, which default conduced to the accident.

The pilot seems evidently to have been assisted in every way. He says that every order he gave was attended to; there is no doubt about that, so that nothing whatever could be attributed to any defect on the part of those who were on board to assist him. Any danger or difficulty that did arise must have arisen from the unfortunately erroneous orders of the pilot. It seems to me, therefore, *that under [796 all the circumstances there is no pretence for saying that the defenders contributed to the injury complained of.

LORD SELBORNE: My Lords, I see no reason for inferring the existence of any special or peculiar principle applicable to the burden of proof in this class of cases.

Your Lordships will observe that there are three things necessary to be proved: first, that a qualified pilot was acting in charge of the ship; secondly, that that charge was compulsory; and thirdly, that it was his fault or incapacity which occasioned the damage.

I apprehend that if a defender proves all these three propositions, and proves nothing more, then the burden is upon the pursuer, not upon the defender, to lay some foundation, at all events, for alleging that, notwithstanding the proof given that there was a qualified pilot in charge, and that compulsorily, and that he committed some fault or

(1) Law Rep., 1 P. C., 426.

showed some incapacity, by which loss or damage were occasioned, yet there was also contributing to the loss or damage other causes for which the owners of the ship were responsible. Some foundation for such a case of contributory negligence must be laid, and the question is upon whom it lies to show that. I apprehend it is clear on general principle that the burden of laying that foundation rests upon the pursuer, not upon the defender. The defender if he has simply proved what he was obliged to prove to exonerate himself, and proved nothing more, is not obliged to travel into the indefinite region of negatives, or to anticipate by denial that for which no foundation is laid to call upon him to deal with it. No doubt the pursuer may discharge the *onus* lying upon him in that respect either by direct proof tendered by himself, or by showing that in the proofs brought forward on the part of the defender there are matters appearing from which fault or negligence which may have contributed to the mischief is legitimately and reasonably to be inferred. Unless he does that he does nothing. When that is done no doubt a further *onus probandi* is thrown upon the defender to rebut the *prima facie* evidence which has been given of contributory negligence on his part.

Whatever may be the precise expressions to be found in 797] any *of the judgments, I see no reason whatever, referring them, as they ought to be referred, to the facts of the particular cases in which those expressions were used, for supposing that an arbitrary rule was meant to be laid down inverting the general principles of *onus probandi* as applied to this particular class of cases. The Lord Justice Clerk seems to me to have expressed the matter very properly, with the exception perhaps of one single word, when he says:

> I should prefer to state the law to be, that it is not enough for the owners to show that the damage arose through the fault of the pilot, if there is reasonable room for saying that there was contributory fault on the part of the master or crew (1).

I confess, my Lords, I should not have used that word "room," I should have used the word "ground;" and have said "if there is reasonable ground for saying that there was contributory fault on the part of the master or crew." The proof of circumstances which *prima facie* show such reasonable ground for saying that there was contributory fault on the part of the master or crew, no doubt would throw upon the defender the burden of explaining those

(1) 4th Series, vol. ii, p. 885.

circumstances so as to satisfy the court that in point of fact the *prima facie* conclusion from those circumstances is not correct. If he fails to do that, he fails altogether. When the principles of law are correctly understood there is no difficulty whatever in applying them to the facts of this case.

The question has ultimately turned upon the want of proper officers on board the ship. In the first instance the argument took perhaps a wider range, and it was said that the ship was not properly manned and officered; but ultimately it was reduced, and reference was made to the by-laws issued for the navigation of the Clyde. After having studied those by-laws, I must say that even if it were clear that they did apply to trial trips as well as to other occasions, in all respects, I am by no means satisfied that there is any proof whatever given in this case that they were not strictly complied with—substantially complied with, at all events.

My Lords, these by-laws are two. The first is:

Every vessel shall during the daytime have one person, and from sunset to sunrise, or in time of fogs, two persons properly qualified stationed at the bow as a look-out, to give notice in due time of any obstruction or danger, who shall be furnished with a trumpet, or horn, or whistle, to be used when there is reason to believe another vessel is near.

*I do not know whether the words, "stationed at [798 the bow," point to anything different from being stationed on the bridge; but in this case the evidence makes its quite clear that the proper place for the look-out was the bridge; and, as a matter of fact, the evidence is that this accident occurred during the daytime, when, according to that by-law, one person only would be sufficient for the look-out; for there was plenty of light, and no fog. There was one person, the pilot, and another person, Durie, who practically acted as an officer, on the bridge the whole of the time, to say nothing of a third person, Ferguson, whom I will mention presently, who was there too, but who may not perhaps have been properly qualified. But that the pilot and Durie were properly qualified for this purpose is perfectly clear; they were in the proper place during the whole time, and there was a trumpet to give proper notice. Therefore, it seems to me that that by-law, at all events, was duly complied with in this case.

The second by-law is,

Every steamer navigating the river shall be manned by an experienced captain or sailing master, and a sufficient number of able-bodied and experienced men, and shall in all cases have a person or persons stationed as a look-out, in terms of Article 2,

There was a person—in fact there were two persons—sta-

tioned as a look-out. It is not now denied that there were "a sufficient number of able-bodied and experienced men," because it is admitted that no case can be made of a want of a proper crew of seamen. The sole question, therefore, upon that by-law would be reduced to this: was the requirement that every steamer should be "manned by an experienced captain or sailing master" duly complied with? My Lords, I venture to say that the pilot was the sailing master in this case; and if there be nothing more than the mere language of that by-law, considered as applicable at all events to a trial trip, I cannot conceive any ground for saying that a pilot might not be a sufficient sailing master within the meaning of the by-law. So much, my Lords, with regard to the by-laws.

Now I come to the pleading; and it does seem to me that if ever there was a case in which the pursuers were to be bound by the inferences to be drawn from their own pleadings, this is a case of that description. For who are these 799] pursuers? They are a *public body who have made these by-laws, a body expressly charged with the care of the navigation of the river Clyde. It is not alleged that they discovered after those pleadings were put in any fact which they did not know before. They knew, therefore, both what was usual in the case of trial trips, and what was reasonably to be required and expected, whether under their own by-laws or otherwise, in respect of the officering and manning of the vessel. And knowing all the facts, they distinctly put upon the pleading this averment, that the accident was due to two causes, or to one or other of those causes, not alleging any other cause besides. Those two causes were, first,

Negligence, or want of proper care and skill on the part of those navigating or steering the vessel.

That is one, and the other cause is,

Gross and culpable defects in her construction and apparelling, and in the hull, machinery, steering-gear, or other appliances.

Therefore they distinctly alleged two causes, one improper steering and navigation at the time; and the other improper construction and fitting up of the vessel itself. But there is a total absence of allegation either that the ship was improperly manned or not properly officered, or that the want of proper manning or proper officering had anything to do with the accident which occurred.

It is impossible, my Lords, for me to doubt that they would have alleged a want of proper manning and proper officering, if, when the pleadings were put in, they had taken

that view of the subject, which in default of anything else to rely upon has been pressed on their behalf at the bar. And when I look at the evidence, bearing in mind that such is the pleading of the pursuers themselves, I cannot but come to the conclusion that if there were any doubtful points in the evidence, any ambiguous points, any room for the suggestion or possible inferences tending to the conclusion that the ship was improperly officered, all doubt and all ambiguity upon that subject ought to be removed when we bear in mind that those who best understood the matter and whose interest it was to suggest these objections, if there were any ground for them, have themselves made no such suggestion, and have shown that they did not rely upon that view of the case.

*My Lords, I think it would be most unreasonable [800 to suppose that you should for a trial trip put on a crew and officers engaged and commissioned in the same way as when the ship is to be sent to sea; and this at a time when she is still only in the hands of the builders, when a temporary purpose is in view, and when she is not delivered over to those whose business it will be to engage the officers and the crew.

Your Lordships have this evidence, that the pilot was in sole charge; and I apprehend, in order to give the defenders the benefit of the exemption under the statute, it was necessary that he should have been so; the pilot was in sole charge, but he had, as my noble and learned friends have pointed out, the assistance not only of a competent crew, and of four persons at the wheel (one of them a quartermaster), but also of Durie and Corrigall, who were in substance acting as officers though not having the engagements of officers at that time. Did they, or did they not, do all that was needful; and were they or were they not in such a position as to make it a right and a reasonable conclusion that the pilot had all the assistance which he could possibly require? My Lords, the pilot whose interest it was, as has been pointed out, rather to exonerate himself than otherwise, as the result of his evidence says that he has no reason whatever to doubt that all his orders were properly obeyed and attended to, and that he needed no assistance with which he was not provided.

Therefore, my Lords, I entirely agree that this appeal must be dismissed.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Agent for the appellant: *W. A. Loch.*
Agents for the respondent: *Grahames & Wardlaw.*

See 13 Eng. R., 292; 9 id., 256; 8 id., 640; 4 id., 176.

As to whether the owner of a vessel is liable for an injury to another vessel through the negligence of a pilot whose employment was compulsory, see The China, 7 Wall., 53, reviewing many cases; Sherlock *v.* Alling, 93 U. S. Rep., 99; The Meteor, Irish Law Rep., 9 Eq., 567.

See The Charles Chaloner, 19 Lower Can. Jur., 201.

As to liability for negligent act of health officers, which passengers were not protected against: Kennedy *v.* Ryall, 67 N. Y., 379, affirming 40 N. Y. Supr. Ct., 347.

As to the right of a pilot who first offers his services to recover for pilotage where another pilot subsequently employed: Brown *v.* Elwell, 60 N. Y., 249; Gillespie *v.* Zittlosen, 60 N. Y., 449, distinguishing Cisco *v.* Roberts, 36 N. Y., 292; Henderson *v.* Spofford, 59 N. Y., 131; 10 Abb. Pr., N.S., 140; Gillespie *v.* Weinberg, 4 Daly, 318; Murray *v.* Clark, 4 Daly, 468; Horton *v.* Smith, 6 Benedict, 264; The Traveler, 6 Benedict, 280; The Nevada, 7 Benedict, 386; Weaver *v.* McClellan, 5 Benedict, 79; Commissioners *v.* Pacific Mail Co., 52 N. Y., 609; Ex parte McNiel, 13 Wall., 236; The Eldredge, Deady, 176; Wilson *v.* Mills, 10 Abb. Pr., N.S., 143; The Alaska, 3 Benedict, 391; Josselyn *v.* Gleason, 103 Mass., 238; Chandler *v.* Doody, 101 Mass., 267; Fowler *v.* Pickering, 119 Mass., 33.

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE,

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE QUEEN'S BENCH DIVISION,

AND BY THE

COURT FOR CROWN CASES RESERVED,

XXXIX VICTORIA.

[1 Queen's Bench Division, 613.]

July 1, 1876.

*METCALFE v. THE BRITANNIA IRONWORKS COMPANY. [613

Charterparty—Right to Freight where Voyage incomplete—Freight pro rata.

A cargo of railway bars was shipped under a charterparty from a port in England to Taganrog in the Sea of Azof, "or so near thereto as the ship could safely get;" freight to be paid in London against certificate of right delivery of cargo. On the arrival of the ship on the 17th of December at Kertch, a port about thirty miles from Taganrog, which was as near as he could then get, the captain found the sea blocked with ice till the ensuing spring; and he proceeded to discharge the cargo, notwithstanding the opposition of the charterer's agent. By the bill of lading the cargo was deliverable at Taganrog to a Russian railway company, "freight and conditions as per charterparty." As no bill of lading was produced at Kertch, the captain placed the cargo in charge of the custom house authorities; and they, on the 27th of December, delivered it to the agent of the railway company, on his producing written authority from the company together with copies of the charterparty and bill of lading, notwithstanding the captain's claim to retain it until the freight had been paid. The agent of the company gave a written acknowledgment that he had received the cargo "on the power of the charterparty and bill of lading passed to me by the railway company." The ship then sailed from Kertch. The shipowner having sued the charterers for freight:

1876 Metcalfe v. Britannia Ironworks Company.

Held, first, that the plaintiff was not entitled to full freight, as the delivery at Kertch was not a delivery, so near to Taganrog as the ship could safely get, within the charterparty; secondly, by Mellor and Quain, JJ., that the plaintiff was entitled to no freight; Cockburn, C.J., being of opinion that he was entitled to freight *pro rata*.

CASE stated without pleadings.

The action was brought to recover £1,491 16*s*. 3*d*., being £1,080 for freight on 900 tons of iron per steamship Meredith, at 24*s*. per ton, as per charterparty of the 7th of October, 1873, and £441 16*s*. 3*d*. for freight on 299½ tons of iron per the same vessel, at 27*s*. 6*d*. per ton as per charterparty of the 3d of November, 1873, and interest thereon.

1. By a charterparty dated the 7th of October, 1873, and made between the plaintiff (therein described as the chartered owner of the steamship Meredith, of the burthen of 4[illegible]/5 tons register measurement, or thereabouts, then bound to London or Dunkirk from the Black Sea) and the defendants, it was agreed that the ship should, with all convenient speed, proceed to Middlesborough-on-Tees, and there load from the agents of the defendants a part of a cargo (say, 900 to 1,000 tons) of railway iron, and being so, 614] *loaded, should therewith proceed to Taganrog, or so near thereunto as she might safely get and deliver the same afloat, on being paid freight at the rate of 24*s*. per ton of 20 cwt., delivered, in full of all port charges, pilotages, &c. (the act of God, Queen's enemies, fire, and all and every other dangers and accidents of the seas, river, and steam navigation, of whatever nature and kind soever during the said voyage, always excepted). The freight to be paid as follows: one third to be advanced on signing bill of lading, if required, less 3 per cent. to cover all charges, and the balance in cash in London, against certificate of right delivery of the cargo.

2. By the charterparty it was, amongst other things, agreed that the ship should have liberty to call at Havre to complete cargo for ports on the way, it being understood that she should not remain in Havre more than seventy-two hours.

3. The ship, after the date of the charterparty, arrived at Dunkirk, and there met with an accident, which necessitated her being repaired, for which purpose she went to Sunderland, and this delayed her arrival at Middlesborough for some time.

4. By a second charterparty, dated the 3d of November, 1873, and made between the same parties, it was agreed that the Meredith should, with all convenient speed, proceed to Middlesborough-on-Tees after repairs, and there load, from

the agents of the defendants, about 800 tons of railway iron, in addition to 900 tons as per charterparty of the 7th of October, and being so loaded, should therewith proceed to Taganrog, or so near thereunto as she might safely get, and deliver the same afloat, on being paid freight at the rate of 27*s.* 6*d.* per ton of 20 cwt. in the same manner as by the first charter.

5 and 6. Both charterparties contain the following provisions:

"Ship to have an absolute lien for all freight, dead freight, and demurrage.

"To address to charterer's agents, Messrs. Berthold, Smith & Co., Taganrog, paying 2 per cent. commission.

"Captain to telegraph from Constantinople and Kertch his departure and weight of cargo to the agent of the Rostoff and Wladikowkese Railway Company, Taganrog, or in default he will have no claim for demurrage."

*7. The Meredith, so soon as she was repaired, [615 proceeded to Middlesborough-on-Tees, and there loaded from the agents of the defendants 900 tons of railway iron under the first charterparty, and 299½ tons of railway iron under the second charterparty.

8: The freights payable under the two charterparties respectively are the sums sought to be recovered as above stated.

9. The Meredith, so soon as she was so loaded, proceeded on her voyage to Taganrog, and arrived at Kertch on the 17th of December, 1873.

10. Upon arriving at Kertch the captain of the Meredith found—and it was the fact—that the Sea of Azof was then closed by ice; that the navigation of the port of Taganrog was effectually closed, and all the buoys, light-ship, and other marks for navigation had been removed for the winter.

11. The captain thereupon proposed to discharge his cargo at Kertch, and made a protest at that place, of which the following are the material parts:

Protest, Steamer Meredith.

Arrived in Kertch on the 17th of December, 1873, with a cargo of railway iron (bars) consigned to the Rostoff and Wladikowkese Railway Company, I found that the Sea of Azof was closed by ice, and that the navigation of the port of Taganrog, where the ship had to deliver the cargo, was officially and to all purposes closed, and all the buoys, light-ship, and other marks for the navigation of its intricate gulf were removed for the winter. Basing myself upon the charterparty, and pointedly to that part of it beginning with "Taganrog, or so near thereunto as she may safely get," and next to the part of it beginning with "the act of God," and ending with "all and every other accident, dangers of the sea, rivers, and steam navigation of whatsoever nature and kind soever during the said voyage always excepted," I determined to discharge the cargo at Kertch as the nearest port to Taganrog, to which the steamer could safely

approach, all others being closed by ice, having given proper notice of such determination to the consignees of the steamer at Taganrog, Messrs. Berthold, Smith & Co., by telegram, dated from Kertch the 18th of December.

Acting on the aforesaid, I am discharging my cargo at this port of Kertch under protest, and at the expense and risk of the consignees, or whom it may concern, as no documents for the reception of the same have been presented. Consequntly I hereby solemnly protest against such receivers of said cargo, holding them responsible for all detention, loss of time, extra expenses, fines of Custom House for late presentation of documents, and whatsoever other charges to which I may be exposed.

20th December, 1873.

12. On the 19th of December, 1873, Messrs. Berthold, 616] Smith *& Co., on behalf of the defendants, sent the following telegram, which was received by the captain before he had commenced the discharge of the cargo: "If you discharge your steamer will be held responsible all consequences infraction charterparty."

13. Kertch was, under the circumstances, as near to Taganrog as the Meredith could get (1), so long as the Sea of Azof was closed by ice, which, according to the ordinary course of weather, would have been until the latter end of the month of April, 1874.

14. As no bill of lading for the cargo was produced to the captain of the Meredith at Kertch, he, in order to protect the ship, landed the cargo at Kertch, and gave it into the custody of the custom house authorities there.

15. By the bills of lading, signed by the captain, the cargo was made deliverable at the port of Taganrog, "all and every the dangers and accidents of the seas and of navigation of what nature or kind soever excepted, unto the Rostoff and Wladikowkese Railway Company, freight and other conditions as per charterparty.

"Captain to apply to Messrs. Berthold, Smith & Co., Taganrog."

16. After a part of the cargo had been landed, one Jean Deopik, a merchant at Kertch, claimed the cargo under a power of attorney from the Rostoff and Wladikowkese Railway Company.

17. When the whole cargo had been delivered to the custom house authorities at Kertch, Jean Deopik produced to them copies of the charterparties and bill of lading for the cargo and his power of attorney, and thereupon the cargo was delivered to him by the custom house authorities, without payment of any freight, and notwithstanding the captain's claim to retain the cargo on behalf of the owner of the Meredith until the freight was paid; and Jean Deo-

(1) On the argument it was agreed that the port of Kertch was about thirty miles from Taganrog.

pik thereupon gave to the captain the following receipt for the cargo: "On the power of the charterparty and the bill of lading passed to me by the agents of the Rostoff and Wladikowkese Railway Company, I hereby declare that I have received the cargo of the S.S. Meredith, composed of six thousand five hundred and seventy-eight (6,578) bars of railway *iron. This receipt to be the only one given, [617 and all others to have no value.

"Kertch, 15/27 December, 1873. Jean Deopik."

The Meredith sailed from Kertch on the 29th of December, 1873.

19. The cargo was in due course received by the said company; but the freight for the same has not been paid pursuant to the said charterparties or either of them.

The court is to have power to draw inferences of fact.

The question for the opinion of the court is, whether under the above circumstances the plaintiff is to be entitled to be paid the chartered freight, or any and what amount for the carriage of the railway iron by the Meredith to Kertch.

Nov. 9, 12. *Cohen*, Q.C. (*Beresford* with him), for the plaintiff.

W. Williams, Q.C. (*Hollams* with him), for the defendants.

The nature of the arguments sufficiently appears from the judgments of the court. All the authorities cited are noticed in the judgments.

Cur. adv. vult.

July 11. COCKBURN, C.J.: This is an action brought to recover a sum due for freight for the conveyance of a cargo of iron bars, shipped under two charterparties on board the plaintiff's vessel, the Meredith, to be carried from Middlesborough-on-Tees to Taganrog on the Sea of Azof, "or so near thereto as the ship could safely get." The defendants were the charterers of the vessel. By the bills of lading, signed by the master, as well as by the charterparties, the iron was to be delivered at the port of Taganrog. It was consigned to the Rostoff and Wladikowkese Railway Company, at the latter place.

The cargo having been taken on board, the ship started without delay on the voyage as agreed on; and arrived on the 17th of December at Kertch, a port distant from Taganrog about thirty miles. On arriving at Kertch, the master learned that the Sea of Azof was blocked up with ice, and the navigation suspended, the effect of which was that the further conveyance of the cargo to its destination was ren-

618] dered impracticable till the ensuing spring, the *navigation being usually closed till the end of April. Relying on the terms of the charterparty, which, as has been stated, provided that the ship should proceed to Taganrog, "or so near thereto as she could safely get," the master, finding that he could get no nearer to Taganrog than Kertch, conceived that he was entitled to land the cargo at the latter place, and proceeded accordingly to discharge and land it. In so doing, he acted in direct defiance of the opposition of the agents of the charterers at Taganrog, to whom he had notified what he was about to do, and who, having thus become aware of it, gave him express notice not to land the cargo at Kertch, and that if he did so he would be held liable under the charterparty. There being no one to receive the cargo, the master placed it under the charge of the custom house authorities. From the latter it was claimed by an agent of the Rostoff and Wladikowkese Railway Company, the consignees, and on the production of the charterparties and bills of lading possession was delivered to their agent by the authorities, notwithstanding a claim by the master that it should be retained till his freight was paid. Upon taking possession, the agent of the consignees, who must be presumed to have had full authority for the purpose, delivered to the master, no doubt by the direction of the authorities, a receipt in these terms:

"On the power of the charterparty and the bill of lading passed to me by the agents of the Rostoff and Wladikowkese Railway Company, I hereby declare that I have received the cargo of the S.S. Meredith, composed of six thousand five hundred and seventy-eight (6,578) bars of railway iron. This receipt to be the only one given, and all others to have no value.

"Kertch, 15/27 December, 1873."

Upon these facts I entirely concur in thinking that the plaintiff is not entitled to recover the full freight. The case of *Schilizzi* v. *Derry* (') established that when a charterparty speaks of a vessel, bound to a particular port, discharging "as near as she can get" to such port, this must be taken to mean some place "within the ambit" of the port; and Kertch certainly cannot be said to be within the ambit of the port of Taganrog.

I also concur in thinking that the receipt given by the 619] agent of *the consignees does not amount to an admission of the "right delivery" of the cargo. It amounts

(') 4 E. & B., 873; 24 L. J. (Q.B.), 193.

to no more than an admission of the delivery of the cargo at Kertch, which is not a "right delivery" of it so as to entitle the owner to the full freight.

But it appears to me that the acceptance of the cargo by the consignees, and the receipt thus given by their authorized agent, are very material facts in determining the further question with which we have to deal, namely, whether the plaintiff, the shipowner, is here entitled to freight *pro rata itineris*.

I agree that, according to the terms of an ordinary charterparty, or bill of lading, the whole voyage for which the freight is agreed to be paid must be accomplished before any freight becomes payable. And I agree that the master cannot, by wrongfully stopping short of the place of destination, compel the owner of the goods to take them, and pay the freight even for the part of the voyage performed, any more than the charterer, on the other hand, can insist on having the cargo delivered at an intermediate place, so as to deprive the shipowner of the opportunity of earning his full freight. If he desires to have his goods short of their original destination, unless some arrangement is come to between them, he must satisfy the shipowner for the entire freight as fixed by the charterparty.

But, it is obvious, that, while such is the absolute right of each of the parties to the charter, this right may be varied or waived; and that, while the shipowner may be willing to forego his right to earn the entire freight, on being paid a ratable part for so much of the voyage as has been performed, the goodsowner, on the other hand, may be willing to take the goods at an intermediate place, and to waive the conveyance of the goods to their original destination, paying a proportionate part only of the freight, all claim to the residue being abandoned. And such an arrangement, in substitution of the original contract, may not only be express, but may also be implied from the circumstances and the conduct of the parties; as was done in the case of *The Soblomsten*(1); and ought to be so implied where justice and equity require it.

Where such an express arrangement has been come to, of course no difficulty exists. The case, in which the question whether such *an arrangement is to be implied usu- [620
ally arises, is where the ship becomes disabled by some *vis major*, and it becomes necessary to land the cargo at an intermediate port, where there are no means of sending it on, and it is there taken possession of by the owner, or sold

(1) Law Rep., 1 A. & E., 293.

by the master for the benefit of those concerned. Nothing could apparently be more unjust than that, having had the benefit of the conveyance of the cargo so far on its way, the owner, if he has derived benefit from its conveyance so far, should be released from the obligation of paying a proportionate part of the freight. No doubt, under such circumstances, it becomes necessary for the master, if he desires to earn the freight, either to repair his ship, or to procure another in which to send on the cargo. But it may be that the ship cannot be repaired, and that no other ship can be procured, or not without such a delay as would be fatal to the goods, or to the adventure. Under these circumstances the owner of the goods is not bound to take to them if unwilling to do so. If they are not worth paying the freight upon, he may refuse to accept them; but if he accept and dispose of them, ought we not to imply an undertaking on his part to pay for the conveyance of them so far as it has gone?

Such was the view taken by Lord Mansfield and the Court of King's Bench, in conformity with the rule laid down by the old authorities on maritime commercial law, in the well known case of *Luke* v. *Lyde* (1). There a cargo of salt fish having been shipped on account of the defendant, a merchant in England, on board the plaintiff's ship, to be conveyed from Newfoundland to Lisbon, the ship, when within a few days' sail of Lisbon, had been taken by a French privateer, but had afterwards been recaptured and brought to England; whereupon the defendant claimed and obtained possession of the cargo. An action of assumpsit having been brought by the owners of the ship to recover freight *pro rata*, Lord Mansfield, in an elaborate judgment, after referring to the old authorities on maritime law, decided in favor of the plaintiffs,—not upon any fiction of a substituted contract, or of a dispensation of part of the voyage originally agreed on, but on the broad principle of maritime law, that, 621] the voyage having been *interrupted without any fault of the shipowner, the merchant, who has had the benefit of partial conveyance, if he takes the goods, must pay freight *pro rata*.

In so holding, the Court of King's Bench appears to me, I must say, to have decided according to justice and good sense.

In the subsequent case of *Baillie* v. *Mogdigliani* (2) a ship bound from Nevis to Bristol had been taken by a French ship and condemned in a French prize court; but the sen-

(1) 2 Burr., 882; 1 W. Bl., 190, S. C., nom. *Luke* v. *Lloyd*.

(2) Park on Insurance, ch. ii, 8th ed., p. 116.

tence of condemnation was afterwards reversed, and restitution ordered. In the meantime, however, the ship and cargo had been sold. The merchants received the proceeds and paid freight to the master *pro rata itineris;* and the goods having been insured, they brought an action against the insurers to recover the amount of freight so paid. It was held that they could not recover; but Lord Mansfield said: "As between the owners of the ship and cargo, in case of a total loss, no freight is due; but as between them no loss is total where part of the property is saved, and the owner takes it to his own use. In this case the value of the goods was restored in money, which is the same as the goods; and, therefore, freight was certainly due *pro rata itineris.*"

The subsequent case of *Cook* v. *Jennings* (1) might at first sight appear to conflict with the foregoing authorities, inasmuch as, the ship having been wrecked on the voyage, but the goods having been saved, the merchant, who had taken possession of them, refused to pay freight, and the action having been brought to recover it *pro rata*, it was held that the action would not lie. But the decision turned on the form of action. The plaintiff having sued on the charterparty, which was under seal, had declared in covenant; and as on reference to the charterparty it appeared that the freight was payable on the right delivery of the cargo at the port of destination, it was held that until this condition had been complied with no freight became payable under the charter; and that the contract being under seal, no implied assumpsit could be raised. Lawrence, J., puts the case on the right ground: "I agree," he says, "with the plaintiff's counsel, that whether the contract be by parol or under seal, the operation *of the law on it is equally the same. [622 When a ship is driven on shore it is the duty of the master either to repair his ship or to procure another, and having performed the voyage he is then entitled to his freight; but he is not entitled to the whole freight unless he perform the whole voyage, except in cases where the owners of the goods prevent him; nor is he entitled *pro rata* unless under a new agreement. Perhaps the subsequent receipt of these goods by the defendant might have been evidence of a new contract between the parties; but here the plaintiff has resorted to the original agreement, under which the defendant only engaged to pay in the event of the ship's arrival at Liverpool. That event has not happened, and therefore the plaintiff cannot recover in this form of action."

The case of *Hunter* v. *Prinsep* (2) is also an authority

(1) 7 T. R., 381.

(2) 10 East, 378.

which, at first sight, may appear to conflict with that of *Luke* v. *Lyde* (1). A vessel, bound from Honduras to London, having been captured and recaptured, and taken by the recaptors into St. Kitts, was there wrecked, but the cargo was saved. The master, acting *bona fide* for the advantage of all concerned, but without orders or authority from the owner of the cargo, and apparently without any necessity arising from inability to forward the goods, having obtained an order from the Vice-Admiralty Court of the island, which order that court had no power to make, sold the cargo. The plaintiff, the owner of the cargo, having brought an action for money had and received against the shipowner to recover the amount of the proceeds, the defendants sought to set off the amount of freight *pro rata*. But Lord Ellenborough, delivering the judgment of the Court of King's Bench, held that, inasmuch as by the terms of the charterparty, which was under seal, the freight was to be paid in particular modes and proportions, "on a right and true delivery of the cargo," no freight had become payable under the charterparty; and that, as the sale of the goods by the master, which had been made without the assent of the plaintiff, and without necessity, was unlawful, and the conveyance of the goods to their destination had thus been rendered impossible by the tortious act of the master, the plaintiff, the 623] *freighter, could not be taken to have dispensed with the further conveyance of the goods according to the terms of the original contract.

It was more difficult to deal with the argument urged on behalf of the defendants, that, by bringing an action to recover the proceeds of the sale, the plaintiff would receive the equivalent of the goods, and therefore, virtually the goods themselves, and consequently became liable for the *pro rata* freight, as much as if he had received possession of the goods themselves on the spot. Nor, in my opinion, was any satisfactory answer given. It was not enough, as it seems to me, to say that the sale was tortious on the part of the master. By waiving the tort, and suing in assumpsit for the proceeds of the sale, the plaintiff became liable,—certainly in point of justice, and, as it seems to me, in law,—to the claim of the defendants for partial freight by way of set-off, just as much as if he had taken to the goods themselves and sold them where they were.

Lord Ellenborough, it is true, puts the matter on such a footing as would render it impossible ever to imply a dispensation by a freighter of performance of part of a voyage.

(1) 2 Burr., 882.

"The general property in the goods," he says, "is in the freighter; the shipowner has no right to withhold possession from him unless he has either earned his freight"—by which the Chief Justice evidently means the entire freight—"or is going on to earn it. If no freight be earned, and he decline proceeding to earn any, the freighter has a right to the possession" (1). It is to be observed, however, that Lord Ellenborough does not seem to have had present to his mind the possibility of a case in which partial freight could be earned. In the case before him the ship had been taken out of her course as the result of her capture, and had been taken into St. Kitts by the recaptors. It is difficult to see how any freight could have been earned. The case of *Luke* v. *Lyde* (2) does not seem to have been dealt with by the court.

In the later case of *Vlierboom* v. *Chapman* (3), however, the question of *pro rata* freight presented itself as the point for decision, and a similar judgment was given under still more striking *circumstances. A cargo of rice having [624 been shipped at Batavia to be delivered at Rotterdam, and the ship having been compelled by a hurricane to put into the Mauritius, the rice was found to have been damaged, and to be in a state of rapid putrefaction, and it was, therefore, as a matter of necessity, sold by the master, of course without the knowledge of the owner, whom at that distance it was, under the circumstances, impossible to consult. An action having been brought against the shipowner by the freighters to recover the proceeds of the sale, the defendant, though the action was in assumpsit, was held not to be entitled to set off the freight *pro rata*. I confess myself wholly unable to follow the reasoning of the court. It seems to have been admitted that, as the goods must otherwise have perished, the master had authority, as agent of the shippers, to sell. Nevertheless, it was held that his thus dealing with the goods as agent for the freighters, although it might amount to an acceptance of the cargo by the latter, did not operate on their part as a dispensation of the conveyance of the goods to their destination, because, as the shipowner was not in a condition to carry it, it could not be supposed that the freighters would dispense with the performance.

Here, again, no notice is taken of the case of *Luke* v. *Lyde* (2), in which, as I have before said, Lord Mansfield and the Court of King's Bench put the right to recover freight *pro rata*, not on any dispensation by the freighters, or new contract in substitution for the charterparty or bill of lading, but on the principle of maritime commercial law,

(1) 10 East, at p. 394. (2) 2 Burr., 882. (3) 13 M. & W., 230.

that the merchant, if he takes the goods short of their destination, when the shipowner, without any default on his part, but through the operation of a *vis major*, is prevented from carrying them on, is bound, having had the benefit of their carriage so far, to pay freight *pro rata*.

The argument of Lord Ellenborough that, where the shipowner is unable to forward the cargo, and so to earn the freight, the right of the shipper to the possession of it at once arises without any corresponding right in the shipowner to freight *pro rata*, may hold where the circumstances give the master no authority to dispose of the goods. But it obviously becomes a very different thing where, the 625] ship having become disabled, and the goods *damaged, the duty is cast upon the master to dispose of the cargo in the interest of the owner of it.

The legal position of the master of a vessel, disabled from carrying on the cargo, at an intermediate port may be stated thus: If he desires to earn the entire freight he must cause the ship to be repaired, or send on the cargo in another vessel. But if he chooses to forego the freight, he is not bound to do either. The ship may be not worth repairing; the expense of hiring another ship may be greater than the freight to be earned. Having done his best to protect the goods, he may leave them to be dealt with by the owners, the only consequence being that he forfeits the freight. But it may be that the master has no option; that the ship is incapable of being repaired, and that no other can be procured, while the circumstances are such as to render it certain that it will not be worth the while of the owner of the goods, either owing to the locality or the distance at which they are found, or owing to their damaged condition, to send out a ship to bring them on; or it may be that the goods are perishable, and would become worthless by any delay. Under such circumstances, if the goodsowner cannot be communicated with, and his instructions taken, within such time as the master can reasonably be expected to wait, the latter, as the servant and representative of the shipowner, has cast upon him the duty of acting for the goodsowner and disposing of the cargo to the best advantage. This obligation is tacitly implied in the charterparty or bill of lading, and, like every obligation to do a thing, involves an authority from the party to whose benefit the obligation enures to do the thing which is the subject-matter of the obligation. Where, therefore, the master, in disposing of the cargo, acts *bona fide* and with reasonable judgment and discretion, the goodsowner will be bound.

The law, as thus laid down by Lord Stowell in the case of *The Gratitudine* (1), has since been universally acquiesced in. This being so, the position of Lord Ellenborough that, where the goods are not about to be carried on, possession may be demanded by the freighter, and if the demand be not yielded to, will be wrongfully withheld, appears inapplicable to the case of a master so circumstanced; and that of Parke, B., that the shipowner, not *being able to [626 carry or send on the goods, it cannot be supposed that the shipper would waive the further conveyance of them, seems equally so, where the master is acting as the agent of both parties, and doing that which is most conducive to their common advantage. If the master, under these circumstances, becomes, to use the words of Willes, J., in *Notara* v. *Henderson* (2), the "agent of necessity" of the shipper, he becomes so as the servant of the shipowner, and by virtue of the original contract, which therefore must be taken to be still subsisting, though the goods cannot be carried on. If the law thus casts on him the duty of acting as agent for the shipper, it does not take from him the character of agent for the shipowner, or the duty of looking to the interest of the latter as well as to that of the former. If he becomes clothed with the character of agent for the goods-owner, he acquires authority to do what the latter, if on the spot, might do, namely, dispense with the further transport of the goods.

It is, moreover, clear that cases may occur in which it would be for the manifest advantage of the freighter that the goods should be sold, and the freight deducted: as, for instance, where the goods, being at an intermediate port, are found to have become so damaged that, if carried on to their destination, they will be worthless when they reach it, as was the case in *Notara* v. *Henderson* (3). That case is an express authority for saying, that the master may not carry on a damaged cargo, for the purpose of earning the freight, where the necessary effect will be the destruction or deterioration of the goods. In such case, at all events where the damage cannot be arrested at a reasonable expense of time or money, it becomes the duty of the master to sell; but it is obviously only equitable that if the master, as the agent of the shipowner, is prevented, in the interest of the shipper, from earning the entire freight at the expense of the cargo, the shipper, in consideration of the benefit he thus

(1) 3 Rob. Adm., 240. (2) Law Rep., 7 Q. B., at p. 230.
(3) Law Rep., 5 Q. B., 346; 7 Q. B., 225.

secures, shall at least pay the freight for so much of the voyage as shall have been performed.

The cases on which I have been commenting, if in point, are of course binding on us, and can only be reviewed, as I hope they will be if the occasion should arise, in a court of
627] appeal. But *they do not go the length of overruling *Luke* v. *Lyde* (1). All they do is to establish that where the master takes upon himself to sell the cargo without express authority from the shipper, though he may be perfectly justified in so doing, as the agent of the latter, by the circumstances in which he is placed, the shipowner cannot recover the *pro rata* freight. They do not touch the case in which the goods come to the hands of the owner short of their destination, and the owner has derived benefit from their conveyance so far, which is what has occurred in the case before us.

In deciding a question of English law, foreign law is, of course, of no authority. Nevertheless, as in a matter of commercial law it is of importance that the rules of commercial nations shall, as far as possible, be the same, it may not be unimportant to see what is the state of the Continental law on this subject. The law will be found in the French Code de Commerce, Article 296; in the Italian Codice di Commercio, at Article 403; in the Spanish Code, Articles 777 and 778; in the Code of the Netherlands, Article 478; in the Prussian Code, Articles 1701–6; in the Russian Code, Article 747; in the German Code, Articles 632–3. The rule in all these is the same, namely, that the master of a disabled ship is bound, if his ship cannot be repaired, to procure, if possible, another to carry on the goods. If both are impossible, he may then abandon the goods to the owners, and will be entitled to his freight *pro rata*, or, as it is termed in the German law, the distance freight. The German law has, however, this qualification, that the freight payable shall not exceed the value of the goods.

In the present instance, the charterers having had the cargo brought from the Tees to within thirty miles of Taganrog, nothing could be more unjust than that the shipowner should receive nothing for the conveyance of it so far. And the principle of the decision in *Luke* v. *Lyde* (1) appears to me distinctly applicable. But besides this, when the facts are closely looked at, an acceptance of the cargo at Kertch by the consignees, and a dispensation of the further conveyance of it may properly be inferred.

(1) 2 Burr., 882.

Being prevented by the state of the navigation from taking *the cargo on to its destination, the master was [628
justified in landing and warehousing it at Kertch, provided he thereby put the charterers to no extra expense. He was not bound to wait with his ship, with the iron on board, till the navigation should be open—a period of four months. All that could be required of him would be that he should bring on or forward the cargo as soon as the navigation should be again open. In the meantime he was at liberty to seek other new employment for his ship in the interest of his owner. The charterers could have no right to exact from him a useless inactivity of several months; nor, if this be so, can it make any difference that the charterers in fact objected to the landing of the cargo. Their objection might have made all the difference if the cargo could have been brought on, but as that was impossible, no prejudice could result to them if not called upon to defray the extra expense. And even if put to such expense, they would always have had their cross claim against the shipowner on the freight.

The next important fact which occurs is, that, the cargo having been landed, the consignees come forward and claim it. But they were not entitled to have it delivered to them till it had been brought to Taganrog, unless it was abandoned by the master, or on the navigation being again opened, he refused to bring it on or to forward it; they could not insist upon delivery short of the port of destination without paying the entire freight, except by arrangement with the shipowner, or the master as his agent. Without paying the entire freight, or coming to such an arrangement, the consignees must have waited four months for the iron rails, which, being wanted for the construction of a railway, it was important to them to obtain without any delay.

When, under these circumstances, I find the consignees asking for the cargo, and the master compelled to give them possession of it, I cannot suppose that the master intended to forego, on the part of his owner, his claim to freight; or that the consignees, in accepting the iron at Kertch, intended to claim it, or understood that they were receiving it free from all claim of freight. The master might be glad to be relieved from all further difficulty as to forwarding the iron; the consignees would be glad to have present possession, so that they might send it by land carriage to Taganrog, *instead of waiting for months to receive it by [629
sea. The question of amount of freight payable—whether

the whole or part—they left to be settled between shipowner and charterers in England. The master evidently thought he had earned the entire freight, for he believed that, having brought the cargo "as near as the ship could get" to the port of destination, he had done all he was bound by the charterparty to do. It is true that in landing the cargo under this mistaken impression the master had no intention of taking it on to Taganrog; but it appears that while he was in the course of landing the iron at Kertch the consignees applied for it, and it was delivered up to them, they giving a receipt for it, the master, on the other hand, insisting on payment of his freight. It seems to me that, under these circumstances, the consignees, who had no right to have the iron carried on to Taganrog till the navigation was again open, must be taken to have accepted it subject to the claim for freight *pro rata*. It is clear that the master had no intention of giving up the cargo without receiving his freight, for he protested against its being given up to the consignees by the authorities without the freight being paid. And, inasmuch as the consignees could not claim to have the cargo brought on to Taganrog till the navigation should be open, it is by no means certain that, if the cargo had not been delivered over to the consignees, the shipowner, on learning what had occurred, would not, in order strictly to fulfil the terms of the charter and prevent all question as to the payment of the entire freight, have provided a vessel to take the iron on when the navigation was reopened. And this would have been the more likely to happen, if the consignees, instead of demanding present delivery of the iron, had protested against its being left at Kertch, and had insisted on its being brought on to Taganrog when the navigation should admit of it. It is highly probable that the plaintiff would then have availed himself of the intervening period, and would have made his arrangements for bringing on the cargo. Of this *tempus pœnitentiæ* he was, as it seems to me, prematurely and unduly deprived by the act of the consignees, in obtaining the possession of the iron from the custom house authorities.

630] *It must be borne in mind as a material fact in this case, and one which distinguishes it from the cases of *Hunter* v. *Prinsep* (1) and *Vlierboom* v. *Chapman* (2), that the master did nothing in the way of disposing of the cargo, or of abandoning it, so as to give up his lien on it for the freight. The cargo was given up to the consignees by the custom house authorities, against the will of the master and not-

(1) 10 East, 378. (2) 13 M. & W., 230,

withstanding his protest. The consignees could therefore, as it seems to me, only take possession subject to the rights of the captain and his owner, one of these rights being, unless clearly abandoned, that of forwarding the cargo when the time came, and so earning the entire freight. Here, again, it is by no means certain that, if the lien for freight claimed by the master had not been disregarded and the cargo handed over to the consignees, the owner would not in due time have sent it on to its destination.

Under these circumstances the case of *Luke* v. *Lyde* (1), which, as far as I am aware, has never been overruled, and which is binding upon us, appears to me to apply. In my opinion, though the charterers' agents protested against the landing of the cargo, yet the consignees, who as to the receipt of the cargo must be treated as the agents of the charterers, must be taken to have dispensed with the conveyance of the iron between Kertch and Taganrog, and to have accepted it subject to the right of the shipowner to freight for so much of the voyage as had been performed. I think, therefore, that to that extent our judgment should be for the plaintiff. But my learned brothers think otherwise, and judgment must therefore be entered for the defendants.

The judgment of Mellor and Quain, JJ., was delivered by

QUAIN, J.: It is unnecessary to recapitulate the facts of the special case, which have been fully stated by the Lord Chief Justice.

Under the circumstances the plaintiff contends,—first, that he is entitled to be paid full freight as on a performance of the whole voyage, or if not full freight, that he is entitled to be paid *pro rata iteneris* up to Kertch.

*In the first place, we think that the master was [631 quite mistaken in supposing that a delivery at Kertch was a delivery so near to Taganrog as he could safely get. According to the judgment of this court in *Sohilizzi* v. *Derry* (2) the meaning of those words is, that the ship must get within the ambit of the port, although she may not be able to enter it. There is no pretence for saying that Kertch is within the ambit of the port of Taganrog.

It was next contended that the full freight was due, as the condition of the charterparty, on the performance of which it was made payable, had been complied with. By the terms of the charterparty the freight was to be paid, one third on signing the bills of lading, and the balance in

(1) 2 Burr., 882. (2) 4 E. & B., 873; 24 L. J. (Q.B.), 193.

cash in London against certificate of right delivery of the cargo.

It was argued that the receipt given by the consignees' agents, and set out in paragraph 17 of the case, was such a certificate. But we are of opinion, assuming that the consignees or their agents were the proper persons to give the certificate required by the charterparty, that the receipt is not a certificate of right delivery of the cargo within the terms of the charterparty, especially as against the present defendants, the charterers, who expressly protested against the discharge of the cargo at Kertch. It is merely an acknowledgment of having received the cargo, and is not the certificate of right delivery required by the charterparty.

It was further contended for the plaintiff that, as the consignees had taken possession of the cargo at Kertch, as described in paragraph 17, the whole freight was payable.

The case of *London & North Western Ry. Co.* v. *Bartlett* (1) was cited in support of this proposition. In that case it was held that the carrier of goods consigned to a particular place may deliver them at any other place than the consignee and the carrier may agree upon, and that in such case the carrier would be entitled to his full freight. So also in the case of *Cork Distilleries Co.* v. *Great Southern & Western Ry. Co.* (2), it was held by the House of Lords that where goods are delivered to a carrier to be carried to
632] *a certain person at a certain place, the consignees may demand the goods of the carrier at another place, and the carrier will be justified in delivering the goods on payment of the full freight.

But in these cases the carrier was ready and willing to carry the goods to their destination and earn his full freight; and refrained from doing so at the express request of the consignees. In the present case, on the contrary, the master discharged the cargo at Kertch without any request from the consignees, and against the express protest of the charterers, and refused to carry it further to its port of destination; and it was not till after this refusal, and when the goods may be said to have been abandoned by the master, that the consignees took possession of them as holders of the bills of lading.

We think, therefore, that the cases cited have no application to the present case. It is said, in paragraph 19 of the case, that the cargo was "in due course" received by the railway company. But we cannot construe the language

(1) 7 H. & N., 400; 31 L. J. (Ex.), 92. (2) Law Rep., 7 H. L., 269.

as intended to contradict or qualify the express statement in paragraph 17, describing the manner in which the cargo was received by the company.

It remains to consider the question whether the plaintiff is entitled to freight *pro rata iteneris*, having carried the goods to Kertch. Claims of this kind usually arise in cases of disabled ships unable by the accidents of the seas to complete their voyage; and we are not aware of any case like the present, where the claim has arisen from the default of the master in refusing to proceed to his port of destination.

The rule on this subject was laid down by Dr. Lushington in the case of *The Soblomsten* (1) as follows: "To justify a claim for *pro rata* freight, there must be a voluntary acceptance of the goods by their owner at an intermediate port, in such a mode as to raise a fair inference that the further carriage was intentionally dispensed with." And the learned judge cites the case of *Vlierboom* v. *Chapman* (2), from the judgment in which case the rule is extracted in the words above quoted.

This case is founded on the earlier case of *Hunter* v. *Prinsep* (3). In that case Lord Ellenborough says that the shipowner has *no right to any freight unless the [633 goods are forwarded to their destination, "unless the forwarding them be dispensed with, or unless there be some new bargain upon this subject. If the shipowner will not forward them, the freighter is entitled to them without paying anything. . . ." He continues: "The general property in the goods is in the freighter; the shipowner has no right to withhold possession from him, unless he has either earned his freight or is going on to earn it." Applying these principles to the facts of the case before us, we feel bound to decide that in this case the claim for freight *pro rata* cannot be supported. This action is against the charterers on the charterparty, and so far from their having voluntarily accepted the goods at Kertch and dispensed with the further carriage of the goods to their port of destination, they gave the master express notice on the 19th of December, and before he had commenced to discharge the cargo (paragraph 12), that if he discharged the cargo at Kertch, that is to say, left it at Kertch without any intention of carrying it further, he would be held responsible for an infraction of the charterparty. It is impossible, therefore, as against the present defendants, to infer that they dispensed with the

(1) Law Rep., 1 A. & E., at p. 297. (2) 13 M. & W., at p. 238.
(3) 10 East, 378, 394.

further carriage of the goods to Taganrog. The case, as far as the present defendants are concerned, is like *Liddard* v. *Lopes* (1), where a similar notice was given by the owners of the cargo, and it was held that no new contract to pay freight *pro rata* could be presumed against the merchant.

But assuming that the defendants would be bound in this action by a voluntary acceptance of the goods by the consignees at an intermediate port, and a dispensation by them of the further carriage (a point about which we entertain considerable doubt, especially after the protest of the defendant's agents), we are of opinion that there has been no such acceptance in this case. In fact, the present case is one in which the master, by an unfortunate mistake, has left the goods at an intermediate port, and refused to carry them on to their port of destination, and it was not till after such refusal that the agent of the consignees took possession of them as holders of the bills of lading. They had no other course to pursue if they wished to preserve their
634] own property. *It is said, however, that the master claimed a lien on the cargo for freight, and protested against the agent of the consignees taking possession, and that by reason of the consignees so taking possession he and his owners were prevented from sending a ship and carrying on the cargo at the opening of the navigation. But the master had no lien for freight: for he had neither earned any freight nor was he going on to earn it; and he having declared that he discharged the cargo at Kertch and did not intend to carry it further, the parties had a right to take him at his word and act on that declaration, and treat it as a breach of the charterparty, and to take possession of the cargo which the master had so abandoned. (See on this last point the *Danube Railway Co.* v. *Xenos* (2), *Frost* v. *Knight* (3), and the cases there cited.)

The case therefore seems to come within the third rule laid down by Dr. Lushington in the case of *The Soblomsten* (4), namely, that no freight is payable, if the owner of cargo against his will is compelled to take the cargo at an intermediate port.

It seems to us that the duty of the master was plain, in the absence of any fresh arrangement between the parties, either to wait at Kertch till the navigation was open and then proceed on his voyage, or to land and warehouse the

(1) 10 East, 526.
(2) 11 C. B. (N.S.), 152; 13 C. B. (N.S.), 825; 31 L. J. (C.P.), 84, 284.
(3) Law Rep., 7 Ex., 111.
(4) Law Rep., 1 A. & E., at p. 297.

goods at Kertch, and return and take them on by his own or another ship when the navigation was open.

For these reasons we are of opinion that the plaintiff is not entitled to recover any freight in this case, and that our judgment must be for the defendants.

We may observe, in conclusion, that the special case before us gives no information as to what ultimately became of the cargo of the Meredith. We are not told if it was ever forwarded to Taganrog either by the charterers or the consignees, nor how the transaction has been arranged, if it ever has been arranged, between the parties. We are therefore entirely ignorant whether in the result the present defendants, the freighters, ever derived any benefit or advantage whatever from the carriage of the cargo to Kertch. We cannot infer necessarily that they must have done so, for many cases are conceivable in which the leaving the *cargo at an intermediate port might be of no benefit, [635 but, on the contrary, cause a serious loss to the freighters.

In the jurisprudence of France and Germany the claim for freight *pro rata itineris* is not based on any such technical ground as a new contract to be inferred from a voluntary acceptance of the goods in such a way as to amount to a dispensation of their further carriage, but seems to be founded merely on the equity and reasonableness of the thing, that the shipowner who has carried the goods a part of the way, of which the freighter has had the benefit, should be proportionately indemnified: see Code de Commerce, Article 294–296, and Valin's Commentary on the Ordonnance de la Marine, Liv. iii, Tit. iii, Art. 9. The German Code, Article 633, expressly provides that in calculating the amount of that indemnity the question is not one of distance merely, but that the circumstances of the case on both sides in relation to the performed and unperformed part of the journey, including the value of the goods at the intermediate port, must be taken into consideration: German Commercial Code, Articles 632, 633, and Makower's Commentary on the German Code, note 123.

Had it appeared from the case before us that the defendants in the present case, notwithstanding the master's failure to complete his contract, had in the result derived benefit and advantage from the carriage of the cargo to Kertch, either in the price received for the goods or otherwise, a question might have arisen whether we might not now be called upon to administer in favor of a shipowner who had carried the cargo to within thirty miles of its destination, and of which part performance the defendants

had the benefit, some of that "larger equity" alluded to by Lord Tenterden as exercised by Courts of Admiralty in similar cases: Abbott on Shipping, 11th ed., 1867, pp. 402–3. Lord Tenterden cites with approbation the judgment of Sir William Scott in the case of *The Friends* (1), in which that learned judge says: "This court sits no more than courts of common law do to make contracts between parties, but, as a court exercising an equitable jurisdiction, it considers itself bound to provide as well as it can for that relation of interests which has unexpectedly taken place under a state
636] of *facts out of the contemplation of the contracting parties in the course of the transaction." Sir R. Phillimore, in the case of *The Teutonia* (2), after citing this judgment, adds that this jurisdiction is not confined to prize cases, but that it is a part of the general power which the court always possessed.

However, as the point to which we have last adverted is not expressly raised by the case, we give no opinion on the subject.

Judgment for the defendants.

Solicitors for plaintiff: *C. C. Ellis & Co.*
Solicitors for defendants: *Hollams, Son & Coward.*

(1) Edw. Ad. Rep., at pp. 247–8. (2) Law Rep., 3 A. & E., at p. 421.

[1 Queen's Bench Division, 669.]

Feb. 10; May 2, 1876.

[IN THE COURT OF APPEAL.]

669] *Polak and Another v. Everett.

Principal and Surety—Interference with rights of Surety—Discharge.

N. was indebted to the plaintiffs, and by deed agreed, first, to pay them £3,400 on the 15th of February, 1874; secondly, within a certain time after the allotment of shares in a company to which he was about to assign his business, to transfer to them shares in it to the nominal value of £6,000, and redeem them at par within twelve months from the 1st of January, 1874; and, fourthly, it was agreed between him and the plaintiffs that the book debts due to him, to the nominal amount of £8,000, should be collected and one-half paid to the plaintiffs, to be applied towards redemption of the shares, and when they had received a sum equal to, or a multiple of, the amount of a share, they were to deliver to him shares at par equivalent to the amount so received. The defendant guaranteed the performance of this agreement by N. so far as concerned the redemption of the shares of the value of £6,000. Subsequently an arrangement was made between the plaintiffs and N., by which, for an equivalent in shares and cash, they released to him their interest in the book debts, that he might dispose of them to the company. The defendant having been sued on his guarantee for a deficiency of £2,250 in the amount of shares:

Held, that the new arrangement was such a variation of the rights of the defendant as surety as to discharge him.

DECLARATION on a guarantee, by which the defendant guaranteed the performance of an agreement made by one Nazarkiewich with the plaintiffs.

The defendant pleaded, on equitable grounds, two pleas, to the effect that after the date of the guarantee the plaintiffs, without the defendant's knowledge or consent, made another agreement *with Nazarkiewich, by which [670 the terms of the previous agreement were materially varied, and the defendant thereby released.

Joinder in issue.

At the trial, before Denman, J., at the Middlesex Michaelmas sittings, 1875, it appeared that, on the 20th of December, 1873, a deed was made between the plaintiffs and one Nazarkiewich, in which it was recited that Nazarkiewich was indebted to them in the sum of £3,400, including interest, and that he had arranged to dispose of his business to a company about to be formed under the title of "E. Nazarkiewich & Co.," and that the £3,400 should be liquidated in manner following. The agreement then stipulated, first, that Nazarkiewich should pay the £3,400 on or before the 15th of February, 1874, and that upon such payment the plaintiffs should transfer to him certain securities which they held; secondly, that he should, within three days after the first allotment of shares in the company should have been made, transfer to the plaintiffs shares to the nominal value of £6,000, and that he should redeem such shares at par within twelve months from the 1st of January, 1874; thirdly, the £6,000, or the part unpaid, was to bear interest at £5 per cent. from the 1st of January, 1874, credit to be given by the plaintiffs on any dividends received from the shares; fourthly, that the book debts of Nazarkiewich, to the nominal amount of £8,000, should be collected by M. Vispé, and should be divided, as collected, equally between the plaintiffs and Messrs. Tampier Frères, and the amount so paid to the plaintiffs should be applied towards redemption of the shares in the intended company, and whenever a sum equal to £250, or any multiple of £250, the amount into which the shares of the company were divided, should have been received by the plaintiffs, they should redeliver to Nazarkiewich a number of shares taken at par value, equivalent to the £250, or multiple of £250, received by them.

Upon the same day the defendant gave the plaintiffs the following guarantee:—

"To Messrs. Polak Brothers,—In consideration of your having signed an agreement, dated this 20th of December,

1873, made between J. M. Polak and J. Polak and E. Nazarkiewich, I hereby guarantee the fulfilment by the said E. Nazarkiewich of the provisions of such agreement, so far
671] only as concerns the full *redemption of the shares, &c., therein mentioned of the value of £6,000, on or before January 1, 1875."

After the date of this guarantee the business of Nazarkiewich was formed into a company and shares were allotted, but he did not perform his agreement to transfer to the plaintiffs shares to the amount of £6,000. On the 1st of July, 1874, an arrangement was made between the plaintiffs and Nazarkiewich under which he handed to them thirteen paid-up shares in the company, representing £3,750, also four acceptances by the new company for £250 each, and £190 in cash, and the plaintiffs signed a receipt as follows, embodying the terms of the arrangement:—

"Received of Mr. E. M. Nazarkiewich thirteen fully paid-up shares of £250 each" (enumerating the securities received).

"And also £190 in cash collected by M. Vispé, the whole amounting to £4,940, being in part discharge of our claim of £6,000; and, provided the above bills are paid at maturity, we agree to release our charge or interest in the book debts of Mr. Nazarkiewich."

On the 7th of July Nazarkiewich sold the book debts of which he had thus obtained possession to E. Nazarkiewich & Co., Limited, the company to which he had transferred his business. The defendant did not agree to these transactions with regard to the book debts, but it appeared that he was a shareholder in and chairman of the company, and was present at meetings when the purchase of the book debts was arranged. On the 29th of December, 1874, the defendant was required, under his guarantee, to make good a deficiency to the amount of £2,250 in the shares which Nazarkiewich had agreed to deliver, the plaintiffs giving credit for £1,250 received from the book debts. He disclaimed liability, and the present action was commenced.

A verdict was directed for the plaintiffs for the amount claimed, with leave to move to enter judgment for the defendant on the pleas, the court to have power to draw inferences of fact.

Notice of motion having been given accordingly,

McIntyre, Q.C., and *J. C. Mathew*, in support of the motion, were stopped.

Philbrick, Q.C., and *R. E. Webster*, showed cause: The

*plaintiffs were entitled to the verdict. It is true [672 that a moiety of the book-debts was security for the redemption of the £6,000 shares, but even if the book debts had realized 20*s.* in the pound, they would not have covered the whole liability. If there is a suretyship for £5,000, with a collateral security for £2,000 which the creditor sells without the consent of the surety, the surety is not discharged. He can say you have improperly dealt with the security, which ought to stand for £2,000, but he cannot say that he is released from liability to the whole £5,000. Here the nominal amount of the debts was only £8,000, but a large proportion were classed as bad, and the price agreed to be paid for all of them by the company was only £4,000. In *Wulff* v. *Jay* (1), where the creditors had a mortgage of the debtor's lease, plant, and fixtures, which was not registered under the Bills of Sale Act, but they allowed the debtor to remain in possession and thereby lost the security, it was held that the surety was discharged, but only to the amount the goods were worth. So here the surety cannot be entitled to more than the full benefit of the security for £4,000, leaving £2,000 recoverable against him.

[BLACKBURN, J.: That was a case of laches. There is a great distinction between a negligent act injuring the surety and an intentional act which injures him.]

The reason why the surety is discharged by any variation of the terms of the agreement with the principal debtor is because he is prejudiced thereby. But here, the defendant had the same benefit which he would have had under the original contract, the full collection of a moiety of the book debts, and his equitable right to have recourse to the collateral security is not injured.

[BLACKBURN, J.: In *Samuell* v. *Howarth* (2) Lord Eldon says, that if there be an alteration of the rights of the surety, though only nominal, and for his benefit, he is discharged.]

Where time is given, or the agreement varied in respect only of part of the debt or security, the rule does not apply.

[BLACKBURN, J.: This point is quite new to me.]

As to the effect of a variation of the surety's rights in respect of part only of his liability, see *Rees* v. *Berrington* (3) *Harrison* v. **Seymour* (4); *Watts* v. *Shuttleworth* (5); [673 *Davies* v. *Stainbank* (6). Moreover, it is not open to the

(1) Law Rep., 7 Q. B., 756.
(2) 3 Mer., 272.
(3) 2 Ves., 540; 2 Wh. & T. L. C., 4th ed., 974.
(4) Law Rep., 1 C. P., 518.
(5) 7 H. & N., 353.
(6) 6 D. M. & G., 679, 689.

defendant to raise the point, as he was chairman of the company, and the plaintiffs were led to believe that he assented to the sale of the book debts.

BLACKBURN, J.: We think that the defendant is entitled to judgment, on the ground that what has taken place has discharged him as a surety.

Now, first, upon the leave reserved, with power for the court to draw inferences of fact, we must take it to be the fact that though the defendant was well aware of this release being executed, he was not an assenting party to it. Then it is argued that knowledge on the part of the surety that there is going to be a release of a part of the security is enough without assent. I cannot see any authority for that. In *Pickard* v. *Sears* (1), it was held that he who stands by and sees another alter his position on the faith of a fact which he can contradict, cannot afterwards take advantage of that alteration. But the rule was corrected in *Freeman* v. *Cooke* (2), where it was said that if a man stands by and allows another to act without objecting, when, from the usage of trade or otherwise, there is a duty to speak, his silence would preclude him as much as if he proposed the act himself. But to say that a person, who, being a surety, becomes aware that the creditor is going to give time or do something else which, if done without his assent, may discharge him, is bound to warn the creditor against doing it, is a thing for which no authority whatever has been cited. That brings us to the question whether what was done in this case did, upon the established principles of equity, discharge the surety.

It has been established for a very long time, beginning with *Rees* v. *Berrington* (3) to the present day, without a single case going to the contrary, that on the principles of equity a surety is discharged when the creditor, without his assent, gives time to the principal debtor, because by so doing he deprives the surety of part of the right he would 674] have had from the mere fact *of entering into the suretyship, namely, to use the name of the creditor to sue the principal debtor, and if this right be suspended for a day or an hour, not injuring the surety to the value of one farthing, and even positively benefiting him, nevertheless, by the principles of equity, it is established that this discharges the surety altogether. The reason given for this, as stated in *Samuell* v. *Howarth* (4) by Lord Eldon, is, be-

(1) 6 Ad. & E., 469, 474.
(2) 2 Ex. 654; 18 L. J. (Ex.), 114.
(3) 2 Ves., 540; 2 Wh. & T. L. C., 4th ed., 974.
(4) 3 Mer., 272, 279.

cause the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he in fact cannot have the same remedy against the principal as he would have had under the original contract. And he adds: "The creditor has no right, it is against the faith of his contract, to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety." The principle being, as I understand it, that as it is very undesirable that there should be any dispute or controversy about whether it is for his benefit or not, there shall be the broad principle, that if the creditor does intentionally violate any rights the surety had when he entered into the suretyship, even though the damage be nominal only, he shall forfeit the whole remedy. Whether that was a good or a just principle originally, is a matter which it is far too late to think about now. I must own I have had considerable doubts about the justice of that principle, but from the time of *Rees* v. *Berrington* (1) it has been undisputed law, and nothing but the Legislature can interfere to alter it.

Now, in the present case the interference with the rights of the surety is not by giving time to the debtor, but it is equally as great an interference. The surety at the time he entered into the suretyship had a right to have these book debts appropriated to reduce the principal debt, and that right he has been deprived of by the act of the creditor in releasing the book debts to the person collecting them. That equitable right has been taken away by his wilful act, and in *Mayhew* v. *Crickett* (2), upon this very question, Lord Eldon says: "When one surety has been discharged the co-surety is entitled to say to the creditor asserting a claim against him, You have discharged the surety from whom I ought to have *compelled con- [675 tribution, either in my own name in equity, or using your name at law." Lord Eldon is speaking here of withdrawing execution on a judgment; the precise amount does not appear, and it was possibly very small; but it was held that the creditor having done this did discharge the surety, on a view which, according to Lord Eldon, is obvious in law and equity.

Now, admitting this to be so, it has been argued by counsel for the plaintiffs that there is a distinction to be taken to this extent, as I understand their argument. The debt

(1) 2 Ves., 540; 2 Wh. & T. L. C., 4th ed., 974. (2) 2 Sw., 185, 193.

here secured—for it is really the same thing as if the debt were secured—is £6,000. Half of the book debts only were pledged as an equitable security for this amount, and they were a security for every portion of the £6,000, but if they paid 20*s.* in the pound they would only produce £4,000, so that there would be some £2,000 which would still remain for which the surety would have been liable, and the argument is that the interference with the rights of the surety in respect to a matter which, though a security for the whole debt, is of less value than the whole debt, does not come within the principle and the authorities. As far as the authorities go, none were cited in which that distinction was taken. There does not seem to be the least authority for it on principle, once concede the rule that where the creditor wilfully interferes with the rights of the surety and alters the equitable rights which he had acquired, alters them, even though it may be for the surety's benefit,—without the surety's assent, the surety is discharged. And it seems to me the principle must equally apply if he alters the surety's privilege of coming upon a security, being a security for the whole undivided debt, although of less value, as if he had altered a security of equal value with the whole debt. There are two or three distinctions to be taken notice of. For instance, there is *Wulff* v. *Jay* (1)—and that case was perfectly rightly decided—where a person is a creditor with a pledge or surety he is in equity bound to account not only for the money he has actually made out of the pledge, but also for the moneys he might, ought, and should have made out of the pledge, and he must allow for that whether he made them or not, and if by laches he has diminished the value of the pledge he is bound to allow for the sum
676] *he ought to have made. But his laches does not discharge the surety, for it does not come within the principle which applies where the surety's rights have been changed or varied. His rights remain as before. The case seems to be like the case where the creditor does not choose to sue the debtor. That does not discharge the surety, for the surety's right remains untouched. So in the case where there is a failure to make the most he could of the pledge, that does not in the slightest degree discharge the surety, though the amount which ought to have been recovered by making a proper use of it is to be allowed in reduction of the debt. In the present case it is not a qnestion of laches, or not making the best of the pledge that could be made, but it is a case of preventing the surety having any recourse

(1) Law Rep., 7 Q. B., 756.

against these book debts at all. There are other cases, but I do not think it is necessary to go into them. There is a distinction made in equity between those rights of the surety which he acquired at the time when he entered into the suretyship, such as securities the creditor then held, and other rights, and he has a right to all those, and *Mayhew* v. *Crickett* (1) establishes, if that security is destroyed, the debt is gone. There are other cases which turn upon this. After the security is established, the surety has a right to have the benefit of new securities, but those not being a part of the original right it is a different question whether the dealing with those would discharge the surety. The present case does not come within that principle. Taking it as it stands here, it seems to me that the defence is made out, and consequently that the defendant should have judgment.

MELLOR, J.: I am of the same opinion, on all the grounds referred to by my Brother Blackburn, and I will not say a word except that as at present advised I am not in a position to concur with him as to the extreme hardship which arises from the rule established in equity. I am not quite sure it does not proceed upon high grounds of policy and convenience. I think it is the old question of contract, and the surety is entitled not to be affected by anything done by the creditor, who has no right to consider whether it might be to the advantage of the surety or *not. The [677 surety is entitled to remain in the position in which he was at the time when the contract was entered into. On that ground I abstain from saying that I entirely concur in the opinion that there is any great injustice or hardship resulting from the rule established in equity.

QUAIN, J.: I am entirely of the same opinion. On the first point, namely, whether, assuming the surety did not consent to this contract on the 1st of July, he is not discharged, I think that he is discharged. I think the convenience and policy of the matter, if we were to go into that, is that the contract of the surety should not be altered without his consent, and that the creditor should not undertake to alter the contract and then say: Although the contract has been altered, and I put it out of my power to carry it out by my voluntary act, I now offer you an equivalent, and put you in the same position, as far as money is concerned, as that in which you would have been if I had not done this. I think that would be a very unsafe state of

(1) 2 Sw., 193.

things, and would be directly contrary to the principle laid down by Lord Loughborough in *Rees* v. *Berrington* (1). He says in that case, "I cannot try the cause by inquiring what mischief it might have done. I am of opinion the surety is discharged. This produces no inconvenience to any one, and it only amounts to this, that there shall be no transaction with the principal debtor without acquainting the person who has a great interest in it. The surety only engages to make good the deficiency. It is the clearest and most evident equity not to carry on any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement." These appear to me to be the principles that govern the case here. Without the surety's consent the creditor here has disposed of these book debts in an entirely different manner to that in which it was intended they should be applied under the original contract. I agree with my Brother Mellor that it is a thoroughly 678] sound and safe principle that, where *the act is voluntary and deliberate, the creditor, altering the contract and rendering it impossible that it should be carried out in its original form, should suffer. This is a sound doctrine which ought not to be impeached, and cannot be impeached, because it is established by authority.

Then, with regard to the second point, whether we ought to draw the inference of fact that the defendant consented to the arrangement, I agree with my Brother Blackburn that the fact of the defendant merely standing by, having no duty to communicate with the plaintiffs, does not amount to a consent. Therefore on both points the defendant is entitled to judgment.

Judgment for the defendant.

On appeal,

May 2. *Philbrick*, Q.C., and *R. E. Webster*, for the plaintiffs, urged the same arguments as in the Queen's Bench Division.

McIntyre, Q.C., and *J. C. Mathew*, for the defendant, were not called upon.

THE COURT (Jessel, M.R., Kelly, C.B., Mellish, L.J., and Denman, J.) had no doubt that the view taken by the

(1) 2 Ves., 540.

Queen's Bench Division was correct, and affirmed the judgment for the same reasons.

Judgment affirmed.

Solicitors for plaintiffs: *Parker & Clark.*
Solicitors for defendant: *Lumley & Lumley.*

[1 Queen's Bench Division, 679.]

May 2, 1876.

[IN THE COURT OF APPEAL.]

*BEGBIE v. THE PHOSPHATE SEWAGE COMPANY, LIMITED (1). [679

Action for Breach of Contract—Failure of Consideration—Money had and received—Fraud.

Defendants, a limited company, being possessed of a process (for which a patent had been taken out in England, but not for the foreign city of B.) for the utilization of sewage, agreed to sell to plaintiff for £15,000 the sole and exclusive right to use and exercise the patent in B. Plaintiff was aware that by the law existing at B. no exclusive right to use the process there could be obtained. The object of plaintiff in buying the exclusive right was, that he might form a company for using the process in B., and might induce persons to take shares in the company under the belief that, if the company bought of the plaintiff the right sold to him by defendants, the company would be entitled to the exclusive use of the process in B. Plaintiff sued defendants to recover the £15,000 on the ground that, as there was no exclusive right to the use of the process in B., the consideration had failed:

Held (affirming the judgment of the Queen's Bench), that no action could be maintained, 1, on the ground that, although defendants ostensibly sold the exclusive right to use the process at B., yet plaintiff's object being to float a company, and induce persons to take shares in it, he had intended to buy the right whether exclusive or not, and he had in fact obtained that for which he had paid the £15,000; 2, on the ground that plaintiff being aware that no exclusive right to use the process in B. could be obtained, had entered into a contract with defendants in contemplation of a fraud upon the shareholders of the intended company.

APPEAL from the decision of the Court of Queen's Bench in favor of the defendants (2).

The facts are sufficiently stated in the head-note.

Butt, Q.C., and *Trevelyan*, for the plaintiff, admitted that, if the view of the facts taken by the Court of Queen's Bench was correct, they could scarcely argue that the judgment was not right; but they contended that the facts admitted of a more favorable construction as far as the plaintiff himself was concerned.

After a minute review of the evidence in detail as given at the trial, without calling upon

Sir *H. James*, Q.C., and *Cohen*, Q.C., for the defendants,

*THE COURT (Jessel, M.R., Kelly, C.B., Mellish, [680 L.J., and Denman, J.) came to the same conclusion of fact

(1) Affirming 14 Eng. Rep., 296. (2) Law Rep., 10 Q. B., 491; 14 Eng. R., 296.

as the Court of Queen's Bench, and affirmed the judgment on both grounds.

Judgment affirmed.

Solicitors for plaintiff: *Combe & Wainwright.*
Solicitor for defendants: *John Holmes.*

[1 Queen's Bench Division, 680.]

Feb. 8; May 3, 1876.

[IN THE COURT OF APPEAL.]

THE VESTRY OF MILE END v. THE GUARDIANS OF WHITECHAPEL UNION.

Metropolis Local Management Acts, 18 & 19 *Vict. c.* 120, *s.* 105; 25 & 26 *Vict. c.* 102, *s.* 77—*Paving New Street—Liability where Street paved through Half its Breadth.*

By the Metropolis Local Management Acts, 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77, the costs of paving a new street, under the compulsory powers of the former act, are payable by the owners of the houses forming and of the land abutting upon such street, and are to be apportioned by the vestry or district board of works. By the interpretation clause of the latter act the expression "new street" is to include a part of any such street.

Buildings and land belonging to the defendants abutted upon a new street which the vestry directed to be paved over half its breadth only; the part paved being that nearest the defendants' premises. The vestry apportioned the whole cost of the paving upon the houses forming the defendants' side of the street, omitting those on the other side:

Held, that the apportionment was invalid, and that the owners of the houses on both sides of the street ought to have been charged.

STATEMENT of claim, that plaintiffs, under the statutes in that behalf, deemed it necessary and expedient that the eastern side of a new street which was not paved to their satisfaction, should be so paved, and thereupon duly and according to the statutes resolved that the same be paved by them throughout the whole length thereof for a uniform breadth of twelve feet measured from the eastern boundary thereof, and that the owners of the houses forming the eastern side of such street should be required to pay to the plaintiffs the estimated amount of the expenses of the works, such amount to be determined by the surveyor of the plaintiffs, and when so determined to be apportioned 681] amongst *such owners, and the owners of the houses and the owners of the land to contribute to such estimated expenses in the same proportion, and the payment of such estimated expenses by such owners to be required, and, if necessary, enforced, before the commencement, during the progress, or on the completion of the works. That in December, 1874, the surveyor of the plaintiffs estimated the expenses of the works at £243 17*s.* 9*d.* That on the 23d

the plaintiffs apportioned the estimated expenses amongst the owners of the houses and land bounding or abutting on the eastern side of the street as follows: On the premises known as the workhouse, belonging to the defendants, including the frontage of the private road belonging to them, £209 7*s.* 7*d.* On the house 616 Mile End Road, and the yard adjoining, £34 10*s.* 2*d.* That the plaintiffs afterwards caused the work to be done, and the actual expenses amounted to £210 17*s.* 4*d.* That defendants at the time aforesaid were, and still are, the owners of the workhouse and premises, being buildings and land abutting upon and bounding the eastern side of the new street, and benefited by the works, and the amount to be contributed by them towards the expenses in respect thereof was £181 0*s.* 3*d.* Breach, non-payment on demand of this sum.

Statement of defence. That, at the time of the resolutions in the statement of claim mentioned and of the doing of the work, there were, and still are, on the western side of the street, houses and land bounding and abutting thereon, the owners of which were and are by law liable to contribute to the expenses of the work. That the plaintiffs have not apportioned the expenses of the work among the owners of the houses and land bounding and abutting upon the street paved by the plaintiffs as in the statement of claim mentioned, but have by the resolutions attempted illegally to throw upon the owners of houses and land bounding and abutting on the eastern side of the street the whole of the expenses of the work; and that the defendants accordingly refused payment of the amount assessed upon them.

Reply. That plaintiffs deemed it necessary and expedient that part only of the street should be paved, viz., the eastern side thereof, and did not deem it necessary or expedient that the western side of the street should be paved, and did not pave it; *and that the houses and lands [682 bounding and abutting on the western side of the street, and mentioned in the statement of defence, did not, nor did any or either of them, or any part thereof, bound or abut on any part of the street which the plaintiffs deemed it necessary and expedient to pave, and which they paved, as mentioned in the statement of claim.

Demurrer to the reply, and joinder in demurrer.

Finlay, in support of the demurrer. The reply is bad. The plaintiffs have, under the Metropolis Local Management Acts(1), no power to throw the expense of paving part of a

(1) By 18 and 19 Vict. c. 120, s. 105, "in case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to

street upon the owners of land and houses adjoining one side of the street only. Both sides of the street are benefited by the paving, and it is unjust to charge the expense upon one side exclusively. [He was then stopped by the court.]

Bazalgette, for the plaintiffs: The plaintiffs were entitled to charge the owners of land and houses abutting on part
683] of a street *with the expense of paving such part of it. In *Whitchurch* v. *Fulham* (1), a case upon the construction of these acts, Cockburn, C.J., says: "The board may make an order that a certain street shall be paved, or they may make an order that a certain part of a street shall be paved, but, whatever order they make, they must follow it out in their apportionment of the expenses, and apportion them among the owners of the whole of the property in and abutting upon the street or part of a street mentioned in the order."

[FIELD, J.: The statute does not say abut on the part paved, but on the street.

BLACKBURN, J.: The other side of the street derives benefit from the paving.]

In the case of a highway with houses on one side only, the owners of these houses might exclusively bear the cost of paving their side, and years afterwards, if the defendants are right, be called on to join the occupiers of new houses

be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate or made, be desirous of having the same paved as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then, and in either of such cases, such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriage-way and foot-paths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair, and the owners of the houses forming such street shall on demand pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board, &c.)."

By 25 and 26 Vict. c. 102, s. 77, "where any vestry or district board shall, under the powers given by 18 & 19 Vict. c. 120, s. 105, have paved, or be about to pave, any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses, or estimated expenses, of paving the same, as well as the owners of houses therein, provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do, and any such costs or expenses, including the cost of paving at the points of intersection of streets, and all other incidental costs and charges, shall be apportioned by the vestry or district board, and shall be recoverable either before the work shall be commenced, or during its progress, or after its completion."

By s. 112, "the expression, 'new street' shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street."

(1) Law Rep., 1 Q. B., 233.

opposite in paying for the pavement of that side of the street.

[BLACKBURN, J.: Such a street would scarcely be a new street within the act.

LUSH, J.: In *Whitchurch* v. *Fulham* (') the street was divided in lengths.]

There is no reason why a street should not be divided longitudinally as well as transversely.

BLACKBURN, J.: I think the defendants are entitled to judgment, and that the case cited has no bearing upon the point raised. The words of the act are not capable of the construction which the vestry seek to put on them. What they mean is that the vestry may pave a street for such part of the breadth as they think fit, but that the cost of so doing must be apportioned on the owners of the houses forming the street, or of the land bounding or abutting upon it, which means and includes both sides of the street. There must be judgment for the defendants.

LUSH and FIELD, JJ., concurred.

Judgment for the defendants.

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*On appeal, [684

May 3. *Philbrick*, Q.C. (with him *Bazalgette*), for the plaintiffs, urged the same arguments as in the court below, citing *Whitchurch* v. *Fulham* (').

Finlay, for the defendants, was not called upon.

JESSEL, M.R.: By the definition the words "new street" include any part of such street; and by s. 105 the vestry may pave the same street, either throughout the whole breadth or any part of such breadth, and the owners of the houses "forming such street" shall pay the expenses to be apportioned upon them by the vestry. The question is a very simple one. If the vestry direct the paving throughout the whole length, or part of the length, of a street, on both sides, cutting it transversely, there can be no doubt that the owners of the "houses forming the street," that is, the houses on both sides, are to contribute. But if the vestry do not choose to pave throughout the whole breadth, the question is, are not they still bound to divide the expenses among the owners of the houses forming the street? What are the houses forming the street, if there are houses on both sides? Surely the houses on both sides. It is argued that houses may be said to form the street, although only on one side; that might be so under the first act, and the second act introduced the owners of land to meet the case

(') Law Rep., 1 Q. B., 233.

where there were not houses on both sides. So that, whether the street be paved throughout the whole breadth, or only a longitudinal section be paved, still, the owners of the houses forming the street and of the land abutting on the street are the persons who are to contribute. The judgment of the Queen's Bench Division must be affirmed.

KELLY, C.B., MELLISH, L.J., and DENMAN, J., concurred.

Judgment affirmed.

Solicitor for plaintiffs: *Millner Jutsum.*
Solicitors for defendants: *Turner & Son.*

The substitution of a new and different kind of pavement from that existing on a public street is not a repair of the street, and a *local assessment* may be laid for the expense thereof, even where the whole width of the street is not so repaved: Matter of Fulton Street, 29 How. Pr. Rep., 429; Brenn *v.* Troy, 41 How. Prac., 475; Blount *v.* Janesville, 31 Wisc., 648; Morrison *v.* Hershire, 32 Iowa, 271; Commissioners *v.* Croweg, 24 Ohio St. R., 492; Municipality *v.* Dunn, 10 La. Ann., 57.

See People *v.* Brooklyn, 21 Barb., 484; Hobbs *v.* Dance, L. R., 9 C. P., 30; 2 Dillon's Munic. Corp., §§ 596–603, 619, 635–8; McCormack *v.* Patchin, 53 Mo., 33.

The extension of a street is not necessarily an *improvement* of the street extended, and is not so treated by the statute of Ohio cited. Whether it is under a different statute cited, quere? Smith *v.* Toledo, 24 Ohio St. R., 126.

But see 2 Dillon's Munic. Corp. (2d ed.), § 638.

Corner lots may be doubly assessed: Morrison *v.* Hershire, 32 Iowa, 271.

A city charter authorized the city authorities to assess the expense of certain street improvements on the owners of property specially benefited thereby. Held that a railroad company in front of whose passenger station and along whose track a street had been paved by the city, was not liable to be assessed for the expense, either on the ground that access to the station was made more easy, or on that of the increased value of the land occupied by the railroad for building or other business purposes: New York, etc., *v.* New Haven, 42 Conn., 279.

Paving the footway and curbing had been done by a property owner on Broad street, Philadelphia, upon the requirement of the authorities; about four years afterwards the roadway was narrowed by councils, the footway widened, and he required to put up a new and costly curb; having neglected this, the city did the work and filed a claim against his property: Held that the foregoing facts, and that the street, &c., were in good condition and required no repair, were a defence to the *scire facias* on the claim.

2. A power to pave, conferred by acts of assembly, implies a power to repair and repave when the condition of the streets requires it; of this the city authorities may *prima facie* judge.

3. A power conferred by the legislature to take up, alter and relay pavements and curbs at the pleasure of a municipal corporation and at the expense of the property owners, who had recently paid for a good pavement, is in derogation of the right of private property, as laying a special tax on a small class.

4. The 40th section of the act of 1854 does not intend to confer the power on the city to make such improvement, except at the expense of the city.

5. The foundation of the power to tax specially, is the benefit the object of the tax confers on the owner of the property.

6. Paving at the expense of the adjoining owner means the expense that is customary: Wistar *v.* Philadelphia, 80 Penn. St. Rep., 505, distinguishing Philadelphia *v.* Hoxie, 38 Penn. St. R., 339; Philadelphia *v.* Tryon, 35 Penn. St. R., 402; Reed *v.* Erie, 79 Penn. St. R., 346.

See 2 Dillon's Munic. Corp., § 619.

The municipal authorities of cities

and villages are the exclusive judges of the propriety and necessity of the widening or laying out of a street within their corporate limits, and, unless there is manifest injustice, oppression, or gross abuse of power in their action, a court of equity will not interfere with the exercise of the discretion vested in them.

An allegation in a bill to enjoin the trustees of a village from taking complainant's land to widen a street, that the trustees, or a majority of them, own a large amount of real estate in the village, and that in taking complainant's lands they are acting in pursuance of an illegal, unjust, fraudulent, oppressive, and unwarrantable scheme and design to deprive the complainant of his property, on the pretext of public necessity, but, in fact, for the sole purpose of enhancing the value of real estate in the village, thereby enabling them, or their relatives and friends to make a more advantageous sale of their property, is not sufficient to show that the proposed widening of the street was merely for a private and not for a public use. The fact that the trustees were influenced in their action by the consideration of the incidental benefit they expected to their real estate, would not render their action unauthorized and illegal, as the principal purpose was the enhancement of the value of all the real estate in the village by increased accommodation for public travel and transportation: Dunham *v.* Hyde Park, 75 Ills., 371; Young *v.* St. Louis, 47 Mo., 492; McCormack *v.* Patchin, 53 Mo., 33, 36–7; Miller *v.* Anheuser, 2 Mo. App. Rep., 168.

[1 Queen's Bench Division, 685.]

May 5, 1876.

*Gatenby and Others v. Morgan and Others. [685

Devise of Land before the Wills Act to nine Persons, "to be equally divided among them"—Devise in Fee with executory Devise over for Life.

A testator, by will of April, 1811, devised certain hereditaments to his granddaughter E. C. and her heirs. But if E. C. died without leaving lawful issue living at her death, the testator devised the hereditaments "unto and to the use of the nine children of J. A., to be equally divided among them share and share alike." And he devised all the residue of his estate to his son P. C.

E. C. died, leaving no issue living at her death. One of the nine children of J. A. survived E. C.:

Held, 1st, that the executory devise over to the children of J. A., being before the Wills Act, created in them a tenancy in common for life only; and, 2dly, that this executory devise affected the previous estate in fee given to E. C. to the extent of such life estates only, and that subject to the life estates the property remained in E. C. and her heirs.

Statement of Claim: Paul Cook, late of Whitby, in the county of York, duly executed his last will, dated the 5th of April, 1811, and thereby devised unto his wife, so long as she remained his widow and unmarried, a dwelling house, with the gardens and appurtenances (then in the testator's occupation), situate in Flowergate, in Whitby, and devised all his messuages, farms, land, and hereditaments called Mortar Pits, and from and immediately after his said wife's decease, the above mentioned dwelling house, with the gardens and appurtenances, unto and to the use of his son Paul Cook and his heirs. But if it so happened that his son Paul Cook departed this life without leaving any issue

lawfully begotten at his death living, then and in that case, from and immediately after his said son's decease, the testator devised the said Mortar Pits and the said dwelling house, with the gardens and appurtenances, unto and to the use of his granddaughter Eleanor Cook and her heirs. But if it so happened that his said granddaughter departed this life without leaving any issue lawfully begotten at her death living, then and in that case, immediately after his said granddaughter's decease, the testator, devised the said Mortar Pits and the said dwelling house, with the gardens and appurtenances, unto and to the use of the nine children then living of his son-in-law John Atkinson to be equally divided among them share and share alike. And the testa-
686] tor devised and gave all the rest, residue, *and remainder of his estate and effects whatsoever, after payment of his just debts and funeral and testamentary expenses, unto his son Paul Cook.

The testator died on the 20th of July, 1811, being at the time of his death seised in fee of the dwelling house, with the gardens and appurtenances, and of the Mortar Pits.

Isabella Cook remained the widow of the testator and unmarried until her death on the 1st of November, 1825.

Paul Cook, the son of the testator, died on the 10th of February, 1834, without leaving any issue lawfully begotten at his death living. He duly executed his will, dated the 21st of April, 1831, and devised all his real and personal estate to the use of his wife Emma Cook, her heirs, executors, administrators, and assigns.

Emma Cook duly executed her will, dated the 17th of August, 1849, and devised the Mortar Pits and the dwelling house, with the gardens and appurtenances, to the use of the plaintiff Catherine Cook Gatenby, her heirs, executors, administrators, and assigns absolutely; and died on the 30th of March, 1852.

The testator's granddaughter Eleanor Cook intermarried with Edward Ridley, and died, without leaving any issue lawfully begotten at her death living, on the 30th of September, 1868.

Eight of the nine children of the testator's son-in-law John Atkinson died before Eleanor Cook (or Ridley). Some of them left issue.

The ninth child, Sarah Atkinson, died without issue on 1st of May, 1872.

The plaintiff Catherine Cook Gatenby claims possession of the Mortar Pits and the dwelling house, with the gardens and appurtenances, as the devisee of Emma Cook.

The other five plaintiffs are the respective heirs-at-law of the nine children, and claim possession of the premises under the devise to the nine children of John Atkinson in the will of the first testator Paul Cook.

Demurrer, on the ground that the statement of claim shows no title in any of the plaintiffs. Joinder.

Manisty, Q.C. (with him *Forbes*), in support of the demurrer: The plaintiffs show no title. First, as to the five plaintiffs who *claim as the respective heirs of the [687 nine children of John Atkinson. The devise to these children, being before the Wills Act, and containing no words of inheritance, created a tenancy in common for life only. The testator uses words of limitation in the previous devises, but in the devise over he omits them; this shows he intended an estate for life only: *Roe* v. *Holmes* (1).

[*Herschell*, Q.C., for the plaintiffs, intimated that he should rely on *Oates* v. *Brydon* (2) on this point.

LUSH, J.: That is an anomalous case. In 2 Powell on Devises, 3d ed., p. 379, it is said: "The authority of this case has been expressly denied, see *Goodtitle* v. *Edmonds* (3), and is virtually overruled by a great multitude of decisions." Lord Kenyon in *Goodtitle* v. *Edmonds* (3) gives Lord Mansfield's reasons for the decision, which cannot be supported.]

Secondly, the plaintiff Catherine Cook Gatenby claims through Emma Cook, and she under the will of Paul Cook, who was the heir and residuary devisee under the will of the original testator, Paul Cook; but Paul Cook, the son, had no interest in the hereditaments in question. The devise in fee to Eleanor Cook was only cut down *pro tanto* by the executory devise to Atkinson's children for life. And on the death of the last tenant for life the hereditaments became vested in possession in the representative of Eleanor Cook. The rule is thus laid down in 1 Jarman on Wills, pp. 823–827 (3d ed.), namely, that the estate originally devised in fee or in tail is affected, by an executory devise for life, only to the extent necessary for the introduction of the life interest, and subject thereto remains in the prior devisee: citing *Hanbury* v. *Cockerell* (4) and *Jackson* v. *Noble* (5). Again, in 2 Jarman on Wills, p. 252 (3d ed.), this precise case is put: "If lands are devised to A. and his heirs, and in the event of his dying under the age of twenty-one and without issue, to B., B. will take an

(1) 2 Wils., 80.
(2) 3 Burr., 1895.
(3) 7 T. R., 635, 640.
(4) 1 Roll. Abr., 835–836.
(5) 2 Keen, 590.

estate for life only. Indeed the seeming absurdity that a testator should mean to defeat an estate in fee for the purpose of substituting a mere life interest (which would be the gist of the argument for expanding the second devise 688] to a fee simple), is wholly avoided by holding *that the second devise defeats the first *pro tanto* only, which appears to be the sound construction." [He also cited *Watkins* v. *Weston* (1).]

Beresford (with him *Herschell*, Q.C.), for the plaintiffs: On the first point, *Oates* v. *Brydon* (2) is precisely in point; the decision proceeded on the ground that the words used here, "to be divided among them," showed that it was the intention that the devisees should take the whole estate, and not a mere life interest.

[FIELD, J.: *Dickins* v. *Marshal* (3) is directly to the contrary on the same form of words.

BLACKBURN, J.: *Oates* v. *Brydon* (2) is contrary to the whole current of authorities.]

On the second point there is no direct decision. *Hanbury* v. *Cockerell* (4) only decided that the executory devise for life was good, but decided nothing as to who had the ultimate remainder or reversion. In *Jackson* v. *Noble* (5) the events on which the executory devise was to take effect could never happen, and it was decided that the person taking under the devise in fee on which the executory devise was attached took an absolute fee simple. Here the excutory devise did take effect, for one of Atkinson's children survived Eleanor Cook, who died without leaving issue. The authority of text writers on the subject is not uniform. Fearne (6) lays it down "that a condition or limitation must determine or avoid the whole of the estate to which it is annexed, and not determine it in part only, and leave it good for the residue." Either, therefore, the devise over to the children of Atkinson gave them a life estate only, in which case the reversion was in Paul Cook, the son, and through him in the plaintiff Catherine Cook Gatenby; or else it gave them the fee, and then the other plaintiffs are entitled.

Manisty, Q.C., was not heard in reply.

BLACKBURN, J.: When the facts are understood, it seems pretty clear on the authorities that the plaintiffs have not shown any title in any of them under the will of the testator. The will was made in 1811, and at that time it had been well established that the heir-at-law was not to be dis-

(1) 3 D. J. & S., 434; 32 L. J. (Ch.), 609.
(2) 3 Burr., 1895.
(3) Cro. Eliz., 330.
(4) 1 Roll. Abr., 835–836.
(5) 2 Keen, 590.
(6) 1 C. R., p. 252.

inherited without a manifest intention *on the part [689 of the testator. Accordingly, unless there were words of inheritance, or words manifesting an intention that the devisee should take the whole estate, the devisee was held to take only a life estate, although in the majority of cases such a construction probably defeated the real intention of the testator. And accordingly, by the New Wills Act, the rule was reversed, and the contrary construction is to prevail—the devisee takes the inheritance, unless there is something to show the contrary intention.

In the present case the will was before the Wills Act, and it must be decided by the old rule. There being no words of inheritance, is there anything to show an intention that the devisees should take more than a life estate in the words of this devise, "unto the use of the nine children of my son-in-law John Atkinson, to be equally divided among them share and share alike"? I do not think there is according to the authorities. There is one case, *Oates* v. *Brydon* (1), which seems an authority to the contrary, and which seems to have proceeded on the assumption that, if property is "to be divided" amongst the devisees, that is sufficient to show an intention to give them the whole estate; and, at all events, Lord Mansfield held that it showed an intention that the property should be sold, and the whole proceeds divided among the devisees. But I do not think the principle satisfactory; and moreover, in *Goodtitle* v. *Edmonds* (2), Lord Kenyon said the case was immediately disapproved of, and explains that Lord Mansfield proceeded on the ground of the smallness of the property, and did not adhere to his decision in subsequent cases. Consequently, on the authorities, the nine children of Atkinson took only life estates, leaving the fee in some one else after the termination of the life estates.

That brings me to the question whether the remaining plaintiff Catherine Cook Gatenby has made out a title. She claims as devisee of Emma Cook, who was devisee of all the estate of Paul Cook, and he was devisee of the residue of the estate under the will of the original testator, and also his heir-at-law. What was the effect of the different clauses in the will as to this property? The testator devised it in fee to his son Paul Cook, but with an executory devise over that, if Paul Cook died without issue living *at his [690 death, then the property should go to the testator's granddaughter Eleanor Cook and her heirs; and then there is a further executory devise over, in the event of Eleanor Cook

(1) 3 Burr., 1895. (2) 7 T. R., 635.

dying without issue living at her death, to the use of the nine children of Atkinson, "to be equally divided among them, share and share alike." This, as I have already said, gives them only an estate for life; and the question is whether, there being one of those children living at the death of Eleanor Cook without issue, the estate of Eleanor Cook wholly ceased, and on the death of the last of the tenants for life, the reversion of the estate passed to Paul Cook as heir-at-law or devisee of the residue; or whether the remainder of the estate reverted to the heirs of Eleanor Cook, under the devise in fee to her, this estate being only so far defeated as to let in the life estate. I am of opinion that the latter is the true construction.

In *Jackson* v. *Noble* (1) there was a similar devise of an equitable fee to the testator's daughter, who became Mrs. Noble, with (precisely as here) an executory devise over, which became impossible to take effect owing to the death of the devisees in the lifetime of Mrs. Noble, and Lord Langdale, M.R., held that Mrs. Noble took the absolute fee simple. That is not precisely this case; because here one of the children who had a life interest survived Eleanor Cook. But can this make any difference? The estate devised to Eleanor Cook was in fee, and at her death was not divested, but survived to her heirs, with the existing devise over, still only a devise for life, interposed, and taking place on the event of her death without issue. In 2 Powell on Devises, 3d ed. by Jarman, p. 240, it is said: "Where an estate is limited in derogation of a preceding estate, and to a partial though not total exclusion of the same,—as where a testator devised lands to his son B. in fee, and other lands to his son C. in fee, subject to a proviso that if either of his sons should die before marriage or before twenty-one, and without issue of their bodies, then he gave all the lands of such of his sons as should so die, &c., unto such of his said two sons as should the other survive,—it was held that the sons took the fee, subject to a limitation to the survivor for life, in case of either dying unmarried, or under twenty-one, and without issue; and that, one of them having attained twenty-
691] *one and died unmarried, the survivor was entitled to his moiety for life": citing *Hanbury* v. *Cockerell* (2). Then the author points out that, "Mr. Preston" (a high authority) "considers that the executory devise did not wholly defeat the original devise to the sons, but only introduced the limitation to the surviving son of an estate for life by way of exception out of the preceding estate in fee. To

(1) 2 Keen, 590.
(2) 1 Roll. Abr., 835–836.

this important rule, namely, that an estate subject to an executory devise, to arise on a given event, is, on the happening of that event, defeated only to the extent of the executory interest, the only possible objection that can be advanced is the total absence of direct authority for it; for the books do not furnish a single example of its application." He then proceeds to point out that the point did not arise in *Hanbury* v. *Cockerell* (1) and in another case in which it might have arisen. But, surely, if the only possible objection is the want of direct authority, reason and common sense ought to be enough to decide the point. It is further pointed out in Powell on Devises, "that Mr. Fearne's position (2), 'that a condition or limitation must determine or avoid the whole of the estate to which it is annexed, and not determine it in part only, and leave it good for the remainder,' must be received with some qualification." Fearne seems to be speaking of a condition or limitation at common law, and not of an executory devise. And I can see no reason why an executory devise should on the happening of the event defeat the estate originally devised to a greater extent than the executory interest itself. There is no direct authority either for or against it; and I think we ought to act on Mr. Preston's view, supported as it seems to me by common sense and reason. That being so, Eleanor Cook and her heirs retained their interest in the remainder, and became entitled in possession after the death of the surviving tenant for life; and therefore none of the plaintiffs have made out a title; and judgment must be for the defendants.

LUSH, J.: I am of the same opinion. The rule of construction before the Wills Act was, that a devise, without words of inheritance, or words clearly implying an intention to give the inheritance, passed only an estate for life. *Oates* v. *Brydon* (3) is inconsistent with this rule, no doubt, but it has been virtually overruled. *Therefore the executory devise to the nine children of Atkinson gave them a life estate only. What was the effect of that executory devise upon the preceding devise in fee to Eleanor Cook? Common sense would say, just so much as the subsequent devise required and no more; that would leave the fee in Eleanor Cook's heirs, subject after her death without issue to the life estates of the children of Atkinson. The case of *Watkins* v. *Weston* (4), and more directly, *Jackson* v. *Noble* (5), supports this view. The true rule seems to be [692

(1) 1 Roll. Abr., 835–836.
(2) 1 C. R., 251, 538.
(3) 3 Burr., 1895.
(4) 3 D. J. & S., 434; 32 L. J. (Ch.), 609.
(5) 2 Keen, 590.

that the executory devise takes away from the previous estate in fee only so much as is necessary for the executory devise itself; and after the death of the surviving tenant for life the estate reverts to the heirs of the previous devisee in fee.

FIELD, J.: I agree that judgment should be for the defendants, on the grounds stated by my learned Brothers.

Judgment for the defendants.

Solicitors for plaintiffs: *Shum, Crossman & Crossman*, for T. Stephenson, Whitby.

Solicitors for defendants: *Bell, Brodrick & Gray.*

[1 Queen's Bench Division, 692.]

May 9, 1876.

WAY v. THE GREAT EASTERN RAILWAY COMPANY.

Carrier—Carrier's Act (1 *Wm.* 4, *c.* 68)—*Felony by Carriers' Servants—Evidence of Service—Estoppel.*

To an action for the loss of pictures delivered by plaintiff to be carried by defendants, a railway company, defendants pleaded the Carriers Act (1 Wm. 4, c. 68), and plaintiff replied that the loss arose from the felonious acts of defendants' servants.

The pictures were loaded in a van in the defendants' yard ready to be sent to their destination, when a man represented himself to be C., a driver in the employ of M., who carried for defendants, and defendants' delivery clerk gave the man a pass which enabled him to drive the van out of the yard, and so to steal the pictures. There was a man named C. in M.'s employ, but he was not the guilty person. The court having power to draw inferences of fact:

Held, that the defendants were not estopped from denying that the thief was their servant.

DECLARATION against the defendants for the loss of three 693] *pictures delivered by the plaintiff to the defendants to be carried for him.

Plea, that the value was not declared, &c., under the Carriers Act.

Replication, that the loss arose from the felonious acts of the defendants' servant. Issue joined.

The following are the material parts of a case stated by consent: The three pictures had been packed in wooden cases. The value of the pictures was not declared, their value has been agreed at £1,000. Had this value been declared at the time of their delivery to the defendants the charge for carriage would have been £50 2*s.* 11*d.*, instead of 2*s.* 11*d.*, the charge actually made. In such a case it is the invariable practice for a policeman to travel with the goods

over the defendants' line, and see them delivered to the London, Chatham and Dover Railway Company.

The defendants carried the pictures by their railway to their goods station in London, known as the Brick Lane station, where, besides the servants of the company, persons having or professing to have business with the company have access. There the defendants loaded the pictures on one of their vans, No. 418, together with some other goods, for the purpose of being conveyed to the London, Chatham and Dover Railway.

At the time the defendants received the pictures the course of business adopted by them in transmitting goods from the Brick Lane station to other railway stations, was as follows: They loaded the goods in their vans or in those of Messrs. Macnamara, who carry for the defendants, or in those of persons employed by Messrs. Macnamara, the vans standing in the Brick Lane station for that purpose. It was the duty of one of the clerks of the department, to which the carmen would be referred, to deliver to the defendants' carmen or the carmen of Messrs. Macnamara, or of their sub-contractors, the delivery sheets for and weight notes of the goods on the respective vans, and also passes to enable them to pass the porter at the gate of the yard, whose duty was not to permit any van to leave the yard without the production of such a pass. Before, however, a carman could obtain from such clerk the delivery sheets, weight notes, and pass, he had to go to an office called the cartage office, where he received verbal instructions *as to what [694 numbered van he could take, what its destination was, and to what department he should apply for delivery sheet, weight note, and pass.

On applying to the clerk of such department, and stating the number and destination of the van, and the person by whom he was employed, the clerk would give him the delivery sheets, weight note, and pass, although he did not know him, on the assumption that he was a carman employed by defendants or Macnamara, or his sub-contractors. No man had a right to act as carman and receive the above documents unless appointed by the defendants, or Macnamara, or his sub-contractors.

On the 18th of December, 1873, while the van 418 was standing in the defendants' yard at Brick Lane station ready loaded, a man applied to William King, the defendants' delivery clerk, and stated that his name was Clarke, and that he was one of Messrs. Macnamara's carmen, and asked for a van, giving the No. 418, and stating its destina-

tion; and he thereupon received from King the delivery sheet and weight note, and a pass, which enabled him to leave the yard, the clerk assuming and believing, from the fact of his telling him the number of the van and its destination and that he was in the employ of Macnamara, that he was in fact in Macnamara's employ.

The man who called himself Clarke, having procured the documents, got on to the van No. 418 and drove it out of the yard, after having delivered his pass to the porter at the gate. The clerks in the cartage office gave evidence that, to the best of their belief, nobody representing himself as Clarke had applied for a van on the day in question, and that certainly no one had been authorized at the cartage office on that day to take away van 418.

The defendants had not a carman of the name of Clarke, but in December, 1873, Messrs. Macnamara had a man of that name. It is admitted that the felony was committed, not by him, but by the man who represented himself to be Clarke. The van 418, it was afterwards discovered, had been left empty in the Whitechapel coal yard belonging to the defendants.

It is agreed that the court shall have power to draw all necessary inferences from the facts stated.

695] *The question for the opinion of the court is whether the defendants are liable on the above facts for the loss of the pictures.

H. Tindal Atkinson (*Philbrick*, Q.C., with him), for the plaintiff: It is immaterial whether the man was the servant of Macnamara or of the defendants, for in the former case he would be the defendants' servant within the Carriers Act: *Machu* v. *London & South Western Ry. Co.* (1). In that case Pollock, C.B., was prepared to hold, if it had been necessary, that the defendants, having held out and trusted the person guilty of the felony as their servant, were estopped from denying that he was their servant.

[BLACKBURN, J.: What is there here to amount to an estoppel?]

The defendants intrusted the pictures to the man as their servant.

[BLACKBURN, J.: No, they never intrusted them to him at all. There may have been negligence, perhaps gross negligence, but that is all.]

The defendants trusted him as the servant of Macnamara, and therefore as their servant.

(1) 2 Ex., 415; 17 L. J. (Ex.), 271.

[BLACKBURN, J.: They did not trust him as servant, King thought he was their servant. That is all.]

The defendants had, *de facto*, possession of the pictures as carriers, and if they intrust the pictures to a person to act in relation to them as their servant, as against the owner they cannot deny that he was their servant, inasmuch as they put him in the position of a servant, and so enabled him to commit the felony. The very object of this part of the Carriers Act was to render the carrier liable, if he committed the dominion of the thing to another to be carried. And it is immaterial that the person turns out to be not really servant, if he has been trusted by the carrier as his servant.

Day, Q.C., (*Marriott*, with him), for the defendants, was not heard.

BLACKBURN, J.: It is impossible, on any fair construction of the act, with reference to the facts, to hold the defendants liable. It is impossible to say that the defendants have so acted as to *represent that the thief was their ser- [696 vant, so as to estop them from denying it. This is a highly artificial attempt to make out a constructive liability on the part of the railway company.

QUAIN, J.: You cannot turn a person, who, by false representations that he is the servant of the defendants' agent, has got from them possession of goods, into the defendants' servant for the purpose of the Carriers Act.

Judgment for the defendants.

Solicitors for plaintiff: *Paterson, Snow & Burney*, for Gipp & Sons, Chelmsford.

Solicitor for defendants: *W. H. Shaw.*

See 14 Eng. Rep., 378 note; 10 Eng. R., 37 note; 20 Am. Rep., 420 note; 10 Am. Law Rev., 642; Sheldon *v.* Hudson River R. R., 29 Barb., 226; Lehman *v.* Brooklyn, 29 Barb., 234.

A preponderance of evidence is ordinarily sufficient in a civil case: 14 Eng. R., 378 note; Sheldon *v.* Hudson River R. R., 29 Barb., 226; Lehman *v.* Brooklyn, 29 Barb., 234; Burnett *v.* Ward, 42 Verm., 80.

In civil cases a jury cannot be required to discard testimony which produces a rational belief, because it does not conclusively establish the fact to be proved: Watkins *v.* Wallace, 19 Mich., 57; 14 Eng. R., 378–9.

That will be entitled to a preponderance, which is most reasonable in view of all the surrounding circumstances, and is most consistent with the conceded facts: Kimball *v.* Myers, 21 Mich., 276.

Presumptions, like probabilities, are of different degrees of strength; and while it is true that, in civil causes, a preponderance of evidence is all that is required, still, to create a preponderance, the evidence must be sufficient to overcome the opposing presumptions as well as the opposing evidence, and more evidence will be required to maintain the affirmative of an issue, when the opposing presumption is strong than when it is weak. To fasten upon a man a very heinous or repulsive act

requires stronger proof than to fasten upon him an indifferent act, or one in accordance with his known inclinations. It is not error to instruct a jury that they should require more evidence to prove that the plaintiff set fire to his buildings to defraud an insurance company than to establish payment of a note or prove an account in set-off: Decker *v.* Somerset, etc., 66 Maine, 406.

See also Ellis *v.* Buzzell, 60 Maine, 209; Knowles *v.* Scribner, 57 id., 495.

A misdirection of the jury, as to the burden of proof, is error for which the judgment will be reversed at the instance of the party prejudiced thereby: McNutt *v.* Kaufman, 26 Ohio. St. R., 127; Watkins *v.* Wallace, 19 Mich., 57.

On the trial of a civil action wherein the claim or defence is based on an alleged fraud, the issue may be determined in accordance with the preponderance or weight of evidence, whether the facts constituting the alleged fraud do, or do not, amount to an indictable offence: Stranathan *v.* Greaves, 26 Ohio St. R., 2; Strader *v.* Mulvane, 17 Ohio St. R., 624.

In an action on a fire policy, where the defense is that the assured burned the property, the rule in civil and not the one in criminal cases, as to the *quantum* of proof, applies; but in view of the nature of the charge, the evidence to establish it ought to be such as clearly to satisfy the jury of its truth: Scott *v.* Home Ins. Co., 5 Western Jurist, 499; 1 Dillon, 105, U. S. District Court, Dist. Mo., Dillon, J.

See Stranathan *v.* Greaves, 26 Ohio St. R., 5, as to whether *insurance* cases form an *exception* to the general rule in civil cases.

See also May on Insurance, §§ 583, 407–411; Kane *v.* Hibernia, etc., 38 N. J. Law, 441; 20 Am. Rep., 409, 420 note; Sloan *v.* Gilbert, 12 Bush (Ky.), 56; 2 Greenl. Ev., § 426 and note; Huhberger *v.* Merchants, etc., 4 Bissell, 265; Richardson *v.* Canada, etc., 17 U. C. Com. Pl., 341; Chishom *v.* Provincial, etc., 20 id., 11; Gould *v.* British, etc., 27 U. C. Q. B., 473; Decker *v.* Somerset, etc., 66 Maine, 406.

A plea of justification may be sustained by a preponderance of testimony in actions for slander, where crime is imputed by the alleged slanderous matter. In such case it is not necessary that the same evidence should be adduced to sustain the plea of justification that would be necessary to convict the plaintiff upon an indictment for the crime imputed to him: Sloan *v.* Gilbert, 12 Bush (Ky.), 51, 53–7, showing why the rule is otherwise in England; Wightman *v.* Western, etc., 8 La. Ann., 442; Hoffman *v.* Western, etc., 1 La. Ann., 216; Schmidt *v.* N. Y., etc., 1 Gray, 529; Washington *v.* Wilson, 7 Wisc., 169; Ætna *v.* Johnson, 11 Bush (Ky.), 587; Kincade *v.* Bradshaw, 3 Hawks (N.C.), 63; Barfield *v.* Britt, 2 Jones' (N.C.) Law, 41; Ellis *v.* Buzzell, 60 Maine, 209; Matthews *v.* Huntley, 9 N. H., 150; Folsom *v.* Braun, 25 N. H., 122.

See 2 Greenl. Ev., § 426; Townsend on Slander (2d ed.), 644; 1 Hilliard on Torts (4th ed.), 407, ch. 15, § 46; 10 Am. Law Rev., 642.

The rule is otherwise in England, for the reason that when a defendant justifies words which amount to a charge of felony, and obtains a verdict in his favor upon the plea of justification, the plaintiff may be put upon trial for the imputed felony without the indictment of a grand jury: Sloan *v.* Gilbert, 12 Bush (Ky.), 53; Cook *v.* Field, 3 Exch., 133; 1 Taylor on Evidence (6th ed.), § 97a, *et seq.*

The rule in New York is the same as in England, though the principle on which the English rule is based does not obtain: 14 Eng. Rep., 378 note; Clark *v.* Dibble, 16 Wend., 601; McKinley *v.* Rob, 20 Johns., 351; Woodbeck *v.* Keller, 6 Cowen, 118; Mitchell *v.* Borden, 8 Wend., 570.

In Vermont, when the recovery is strictly a penalty, the rule in criminal cases applies: Burnett *v.* Ward, 42 Verm., 85–6.

S. was examined as a witness against T. charged with the crime of rape. He was asked if he and T. had not agreed to commit the rape, and if he did not hear the cries of the girl while T. had her in the bushes; he denied both. The examination was interrupted for a few minutes, and the witness retired into another room, when he stated to two of the officers and another person, that to help T. he had sworn falsely; when his examination was resumed he said that he and T. had agreed to commit the rape, and that he did hear the

cries of the girl. S. was then indicted for perjury in making the first statement. There was no evidence against him but his own statements: Held, his statements were not sufficient to convict him: Schwartz *v.* Com., 27 Gratt. (Va.), 1025.

See People *v.* Burden, 9 Barb., 469, as explained in Schwartz *v.* Com., 27 Gratt. (Va.), 1029.

[1 Queen's Bench Division, 700.]

May 25, 1876.

*LEE V. GASKELL. [700

Statute of Frauds (29 *Car.* 2, *c.* 3), *ss.* 4, 17—*Sale of Tenant's Fixtures.*

The tenant of premises having become bankrupt, the trustee sold the tenant's fixtures on the premises to the plaintiff, and he sold them to the defendant, the landlord. There was no agreement in writing, and the value of the fixtures was above £10. An action having been brought for the price:

Held, that the sale was not within s. 4 of the Statute of Frauds as the sale of an interest in land, nor within s. 17 as the sale of goods and chattels; and the action was therefore maintainable.

Hallen v. *Runder* (1 C. M. & R., 266) followed.

STATEMENT of claim, *inter alia*, that plaintiff sold to defendant a gas-meter and certain gas-fittings then in a certain mill. The plaintiff furnished defendant with a bill for the meter and fittings, amounting to £11 18*s.* 8*d.*, which the defendant promised to pay, but has not paid.

Statement of defence: Defendant denies the sale as alleged and that he received the bill and promised to pay it as alleged. That there was no note or memorandum of the bargain in writing signed by the defendant or his agent, nor did he accept part of the goods *and actually receive [701 the same, nor did he give anything as earnest money or as part payment, within 29 Car. 2, c. 3, s. 17.

At the trial before Brett, J., at the Manchester spring assizes, it appeared, as to this part of the plaintiff's claim, that the defendant was landlord of the mill in which the fixtures were, they were tenant's fixtures, and the tenant had become bankrupt, and the trustee sold them to the plaintiff, and he afterwards sold them to the defendant for the sum claimed. It was objected that the contract came within either s. 4 or s. 17 of the Statute of Frauds; and the learned judge directed judgment for the defendant, giving leave to move to enter judgment for the plaintiff.

J. Edwards, Q.C., for the plaintiff, moved accordingly: This was not a contract within either section of the Statute of Frauds. *Hallen* v. *Runder* (1) is directly in point that such a contract is neither an agreement for the sale of an interest in land within s. 4, nor an agreement for the sale of

(1) 1 C. M. & R., 266.

goods and chattels within s. 17. This case is recognized as good law in the notes to *Greene* v. *Cole* (1).

H. Collins (with him *C. Russell*, Q.C.), for the defendant: It must be admitted that *Hallen* v. *Runder* (2) is an authority that such a contract is not one relating to an interest in land within s. 4; but there is no decision that s. 17 did not apply, and it may be observed that possession had been taken by the landlord, who was the purchaser in that case. Here the sale was not by the tenant direct to the landlord, but from the tenant or his trustee to the plaintiff, and by him to the landlord.

[COCKBURN, C.J.: Is it more than the sale of the right to sever? the fixtures had not been severed.]

Bayley, B., in *Hallen* v. *Runder* (2), says: "It [the sale] effects a severance when the purchase is complete, but not before." The purchase here was complete as between the trustee and the plaintiff, and the fixtures therefore had become chattels by the original sale, before they were resold to the defendant.

[QUAIN, J.: They had not in fact been severed when the plaintiff sold to the landlord; what have we to do with any original sale?]

702] *The plaintiff has no title except by that sale. The question is treated as doubtful in Amos and Ferard on Fixtures, p. 252–4, where *Parker* v. *Staniland* (3) is cited, in which it was held that the sale of a growing of crop of potatoes was a contract, not within s. 4, but within s. 17. *Smith* v. *Surman* (4) is to the same effect; and the case of fixtures is very analogous to that of growing crops, as is pointed out by Parke, B., in *Hallen* v. *Runder* (2).

COCKBURN, C.J.: The case of *Hallen* v. *Runder* (2) is directly in point and binding upon us, and I think the principle on which it was decided was perfectly right. Fixtures, although they may be removable during the tenancy, as long as they remain unsevered, are part of the freehold, and you cannot dispose of them to the landlord or any one else as goods and chattels, because they are not severed from the freehold so as to become goods and chattels. All you can do is to bargain for the sale of them as fixtures, which are subject to the right of the tenant to remove them during the term, but which right is liable to be lost if it is not exercised during the term. There is but a remote analogy between fixtures and growing crops, but there is this obvious dis-

(1) 2 Notes Saund., 656.
(2) 1 C. M. & R., 266.
(3) 1 C. M. & R., at p. 269.
(4) 11 East, 362.
(5) 9 B. & C., 561.
(6) 1 C. M. & R., at p. 275.

tinction between them,—fixtures, when sold as fixtures, are intended to remain where they are, while, as to growing crops, it is the express intention of the purchaser to remove them.

MELLOR and QUAIN, JJ., concurred.

Judgment for the plaintiff.

Solicitors for plaintiff: *E. Milne & Co.*

Solicitors for defendant: *Pritchard & Englefield*, for Grundy & Kershaw, Manchester.

[1 Queen's Bench Division, 703.]

May 10, 1876.

*THE QUEEN v. THE INHABITANTS OF GREENHOW. [703

Highway—Indictment for Non-repair—Landslip covering Part of Highway—Exemption from Liability.

Upon the trial of an indictment for the non-repair of a highway, it appeared that the highway ran along the slope of a hill several hundred feet above the level of a valley beneath. Two landslips occurred on the slope of the hill, comprising many acres of land, and part of the highway was carried away into the valley below, and its place filled up with earth, stones and other debris. The debris was at one point twenty-five feet above, and at another two feet below, the level of the old road, and occupied the line or track of the highway. At the point where it was twenty-five feet above the level of the old road it had been ascertained by boring that, for a depth of thirty and a half feet from the surface, there was nothing but soil, shale and stones, and that there was no trace of the old metalled road, but the line of it was known and admitted. Evidence was given that it was practicable to form a road along the old track of a similar character to the adjoining parts of the old road at a cost of £341:

Held, the court having power to draw inferences of fact, that there was no proof of such destruction of the highway as to exempt the parish from their liability to repair it.

INDICTMENT against the inhabitants of the township of Greenhow, in the North Riding of the county of York, for the non-repair of a highway. The indictment was removed by *certiorari* into this court, and came on to be tried before Amphlett, B., at the York spring assizes, 1875, when a verdict of guilty was found by consent, subject to the opinion of the court, upon the following case:—

1. The defendants are the inhabitants of the township of Greenhow, one of three townships in the parish of Ingleby Greenhow. And it is admitted, for the purposes of this case, that the township of Greenhow is liable to maintain its own highways.

2. The road is a common Queen's highway, called Broughton Bank Top, leading from Stokesley to Bilsdale.

3. The indictment alleges that a part of the road in the township of Greenhow, being in length 251 yards and in

breadth 6 yards, on the 1st of July, 1873, and from thence until the date of the indictment, was in great decay for want of due reparation.

4. The highway in question is an ordinary metalled road, and that part of it mentioned in paragraph 3, and now in dispute, runs north and south along the slope of a hill sev-
704] eral hundred feet *above the level of the valley beneath the slope, being at right angles to the direction of the road and very precipitous.

5. Up to the time of the landslip hereinafter mentioned, the road was a highway repairable by the parish or township of Ingleby Greenhow, and was, and except as hereinafter mentioned now is, in good and proper repair.

6. In April and June, 1872, two landslips of great magnitude occurred on the slope of the hill, the second being a continuation of the first, the two landslips together comprising many acres of land, and extending from the top of the slope to about 170 yards below the highway.

7. The part of the highway now in dispute and out of repair was absolutely destroyed by the landslip, that is to say, was carried away into the valley below, and its place supplied and filled up with earth, stones and other debris of landslip.

8. A large portion of the hillside was moved bodily downwards to the valley beneath, and the ground on which the old road stood was broken up and carried away as stated.

9. The depth and level of the debris along the line of the old road differs much. The debris is at one point twenty-five feet above, and at another two feet below, the level of the old road, and now occupies the line or track of the old highway.

10. This debris consists of loose soil, stones, and shale, and there is water, coming from springs on the hillside, which percolates through and over it, and from the time of the original landslips up to the present time, in dry weather, both horses and some carts and conveyances still continue to pass over it, nearly in, but higher up the hill than the line of the old road, and of course with great danger and difficulty. In wet weather the debris is at times so full of water as to be impassable, as there are no drains.

11. At the point where the debris is twenty-five feet above the level of the old road, it has been ascertained by boring that, for a depth of thirty and a half feet from the surface, there is nothing but soil, shale, and stones, and that there is no trace of the old metalled road, but the line of it is known and admitted.

12. The metal, consisting of broken stones, of the old road has been carried away at one point fifty-five yards down the hill into the valley from its original position, and a wall which ran along *the east or lower side thereof, [705 as a fence or boundary on that side, was carried downwards along with the road, and is visible among the debris for about fifty yards of its length.

13. At the north edge of the landslip, at the point where the same meets the uninjured portion of the highway, the site of the old road is scooped out and lowered, so that there is a fall of some few feet from the uninjured metalling to the debris on the line or track of the old road.

14. A verdict of guilty was entered, subject to the finding of an engineer, on the following three questions, namely: 1st. What had become of the old road, and whether and to what extent had it been carried away from its former position. 2d. Whether and to what extent it had been absolutely destroyed. 3d. Whether it was practicable, and at what cost, to make a permanent and passable road along the whole track of a similar character to the adjoining parts of the old road; and it was ordered that upon such finding a special case might be stated at the request of either party.

15. The engineer having viewed and inspected the *locus in quo* and taken such evidence and obtained such information and assistance as he thought fit, made his report on the 4th of November, 1875, and found the facts as follows: 1. The old road had been carried away and overlaid by a landslip, at a point called Broughton Bank Top, to an extent of 252 yards or thereabouts. 2. The road is absolutely destroyed for the extent to which it is carried away and overlaid, amounting in the whole to the said length of 252 yards. 3. It is practicable to form a permanent and passable road along the old track of a similar character to the adjoining parts of the old road, and the cost of doing so would be £341.

16. The ratable value of the whole parish is £4,756, and a rate of 5*d.* in the pound on this amount produces £100 or thereabouts.

17. There is in existence a good road from Bilsdale to Stokesley, which diverges from the destroyed road at a point on the Bilsdale side of the landslip and reaches Stokesley by way of Ingleby Greenhow, but by this road from the point of divergence the distance to and from Stokesley is increased by one mile and two-thirds of another mile, and persons using the same having also to pass through, open and close several gates.

706] *18. On this road the defendant township has, since the said landslip, expended a considerable sum in improving it, so as to reader it more convenient.

19. There is also a road from Bilsdale to Stokesley by way of Carlton; these roads are both of them longer in distance than the destroyed road, but the gradients are somewhat better.

20. The court is to be at liberty to draw inferences of fact.

21. The question for the opinion of the court is, whether there exists a legal duty or obligation upon the defendants to make and maintain an available carriage road in the line or track of the old road, so as to form and continue a permanent and passable highway from Stokesley to Bilsdale at the part destroyed.

Wills, Q.C., and *Forbes*, for the prosecutors: There is nothing to relieve the defendants from their obligation to maintain the road for public use as a highway. The only case in which the defendants could be excused from liability is where the substance of the road has been destroyed by the act of God or some extraordinary accident. The law is clearly explained in *Reg.* v. *Hornsea* (1), where upon an indictment for non-repair it appeared that the highway ran down to the sea, the land gently sloping to the water's edge, and that by the encroachment of the waves the land and road were swept away. It was held that the obligation to repair was gone, as there was no highway to repair.

[QUAIN, J.: The common law confines the obligation of the parish to repairs; it does not require them to make a road.

BLACKBURN, J.: In all these cases it is very much a question of degree.]

In the present case the road along the old track could be restored at a very moderate expense. *Reg.* v. *Bamber* (2) is another case where part of the highway was encroached upon by the sea, and it was stated that it would cost a very large sum of money to make a road in place of that destroyed; but Lord Denman, while holding the parish not liable, did not rely upon the argument that the ancient line of highway had been removed, but upon the fact that it would be necessary to create the earth anew. The case of *Reg.* v. *Paul* (3), where the highway ran along the top 707] of a quay, *part of which was washed away by the sea, is precisely similar. There is nothing to show that the money required for the repairs is an unreasonable sum.

(1) Dears. & P. Cr. C., 291; 23 L. J. (M.C.), 59. (2) 5 Q.B., 279.
(3) 2 Mood. & Rob., 307.

Cave, Q.C., for the defendants: The question whether it is reasonably practicable for the parish, under the circumstances, to repair the road, can hardly be the test of their liability. In *Reg.* v. *Hornsea* (1) Maule, J., suggests, as the condition of liability, does the highway still exist?

[BLACKBURN, J.: What is the alteration of the *locus in quo* which in point of law enables one to say that the road no longer exists?]

The arbitrator has found in effect that, to carry out the repairs, it will be necessary to construct a new way. It may be difficult to lay down any general rule as to what is a substantial destruction of a highway, but here there is enough to show that the old road has been destroyed. Under the Highway Act, 27 & 28 Vict. c. 101, ss. 47, 48, the highway board may, in place of the parish, execute the necessary works.

[BLACKBURN, J.: Is there any power to compel them to execute such works?]

It must be admitted that there is not.

BLACKBURN, J.: In this case I have great difficulty in giving a precise definition of what constitutes a destruction of a highway, but upon the facts found by the arbitrator I have come to the conclusion that enough has not been done or happened to the road in question to relieve the parish from the liability to repair it. Whether a highway has been destroyed or not, is a question of more or less, and it is a matter of common sense that where the road has been swept away and occupied by the sea, you cannot call on the parish to repair it, or in the case of a sea wall, where the public have acquired a right to walk on the top of the wall, the parish could not be obliged to rebuild the wall if it were washed away by the sea. On the other hand, it would be equally impossible to say that, when, in consequence of a landslip or one of those floods which frequently occur in certain districts, the surface of a metalled road is filled up or covered over, the parish is *relieved from liability. [708 The same observations apply to the case where a quantity of gravel or debris is thrown from above on a highway, and the line of the old road remains as before.

Here we have the facts that the highway ran along the slope of a hill, that a landslip occurred, and that part of the highway was driven into the valley below, and its place supplied by earth, stones, and other rubbish. It appears that at one point this rubbish is twenty-five feet above the level of the old road, and that there is no trace of this old

(1) Dears. & P. Cr. C., 291; 23 L. J. (M.C.), 59.

road, but that the line of it is known and admitted. Now, can we draw the inference that the old road has been wholly destroyed? I think, upon the facts which I have stated, I could hardly do so; but then we have the report of the surveyor that it is practicable to form a permanent and passable road along the old track of a similar character to the adjoining parts of the old road, and that the cost of doing so would be £341. I think that, in drawing such an inference, it would always be a question of more or less, and, for my part, the operations which are described as necessary do not seem to me to involve any enormous difficulty. Therefore, in drawing my inferences of fact, I think it cannot be said that the road was annihilated, and that it was impossible, in a commercial sense, to repair it, that is, that it would cost more than the subject-matter of repair is reasonably worth.

QUAIN, J.: I am of the same opinion. It is very difficult, as has already been said, to lay down any rule as to when a road must be regarded as completely destroyed. In the cases which have been referred to, the highway was not injured in the manner described in this case, but the sea occupied the site of the road itself. Now, can we say that there was here such a complete destruction of the whole road as to bring the case within these authorities. All we find is that a large part of the road was carried away into the valley below, and that the line of the whole road is covered with debris, the depth of which differs very much. The only destruction of the highway that I can find is that the metalled part of the road has been carried away from its former position, or overlaid, while the old line of the road remains as before. Looking at these facts, I cannot
709] think that it is *possible for us to say that the road has been absolutely destroyed, so as to exempt the parish from liability to repair. The cases which have been brought before us are cases where there was a total destruction of the highway, and, for the reasons which I have given, I think that a total destruction has not been shown, so as to relieve the defendants from their liability.

Judgment for the Crown.

Solicitors for prosecutors: *Bell, Broderick & Gray.*
Solicitors for defendants: *Williamson, Hill & Co.*

[1 Queen's Bench Division, 709.]

June 20, 1876.

LUTSCHER v. THE COMPTOIR D'ESCOMPTE DE PARIS.

Consignor and Consignee—Equitable Assignment of Bills of Lading—Right to recover against third Person for Detention.

The plaintiff was in the habit of receiving goods consigned to him by L. for sale upon commission, and in order to place L. in funds for the purchase of the goods, agreed to allow L. to draw upon him. The documents of title of the goods were hypothecated to the plaintiff to enable him to provide funds to meet the bills so drawn by L. The plaintiff accordingly, and at the request of L., arranged for the sale of a parcel of goods, to be shipped by a vessel chartered by the buyers, and L., having drawn upon the plaintiff for that purpose, purchased and shipped the goods. The bill of lading was handed to L., but never forwarded to the plaintiff, and L.'s affairs being put in liquidation, the liquidator placed the bill of lading in the hands of the defendants with instructions not to part with it until they were paid the value of the goods, and they accordingly refused to give it up to the plaintiff:

Held, that the plaintiff had an equitable right to the bill of lading, and was entitled to sue the defendants for the wrongful detention of it.

STATEMENT OF CLAIM: 1. The plaintiff is a merchant, and carries on business at 8 Austin Friars, London. 2. The defendants are bankers carrying on business at 144 Leadenhall Street, London. 3. During and since the month of April, 1875, the plaintiff has had consigned to him by Louis Levy, a merchant carrying on business at Oran, in Africa, cargoes of palm leaves and other produce upon the terms mentioned in the next paragraph. 4. In order to place Levy in funds for the purchase of the said produce, the plaintiff agreed to allow him to draw upon the plaintiff's firm. Levy was to make purchases in Africa of the said produce, *and ship the same to the plaintiff. The [710 plaintiff agreed to effect sales in this country of such shipments, charging a commission thereon. The documents of title of such shipments were hypothecated to the plaintiff so as to enable him to provide funds to meet the bills drawn by Levy. 5. On the 27th of May, 1875, the plaintiff, at the request of Levy, and in pursuance of the said agreement set out in the fourth paragraph, contracted with the Tovil Paper Company, Limited, carrying on business at Maidstone, in Kent, to sell to them 250 tons of palm leaves at £3 per ton, free on board in Oran, payment to be by acceptance of the buyers at three months on delivery of the bill of lading. The cargo to be shipped by vessel chartered by the buyers, to arrive at Oran aforesaid not later than the 31st of October, 1875. 6. Levy having drawn upon the plaintiff in pursuance of the said agreement set out in the fourth paragraph, was enabled to purchase, and did in fact pur-

chase, 250 tons of palm leaves, and the same were shipped on board the steamship Sydenham, chartered by the said Tovil Paper Company, Limited, the loading of the cargo being entirely completed on the 22d of October, 1875. 7. The bill of lading was, on the 22d of October, 1875, duly signed and handed by the captain of the steamship Sydenham to Levy, and the plaintiff alleges that the same should have been transmitted to the plaintiff by Levy in order to put the plaintiff in funds to meet drafts of Levy upon the plaintiff under the agreement aforesaid. 8. Upon the 23d of October, 1875, Levy stopped payment, and his affairs were placed in liquidation. The liquidator having obtained possession of the bill of lading, instructed the Bank of Algiers to transmit it to their correspondents in London, who are the defendants, with directions not to part with the same until they were paid the sum of £538 4*s.* 2*d.*, the alleged value of the cargo of 250 tons of palm leaves. 9. Upon the 4th of November, 1875, the plaintiff having paid the drafts of Levy to a large amount, which amount is still due to the plaintiff, applied to the defendants for the bill of lading, but was informed of the instructions they had received. The plaintiff claimed the bill of lading under his agreement with Levy, but the defendants refused to part with the same unless they were paid the sum of £538 4*s.* 2*d.* 10. The plaintiff, on the 8th of November, 1875, under protest, paid to the de-
711] fendants the sum of *£538 4*s.* 2*d.*, and obtained the bill of lading. Averment, that the defendants improperly withheld from the plaintiff the bill of lading to which the plaintiff was entitled under the agreement with Levy.

The statement concluded by claiming the payment of the £538 4*s.* 2*d.* so paid with interest, and damages for the detention of the bill of lading.

Demurrer and joinder in demurrer.

Holl, in support of the demurrer: The statement of claim does not show such a title in the plaintiff to the bill of lading, or such a wrongful detention of it by the defendants from him as entitles him to recover back the money paid to obtain possession of the document. There was no hypothecation of the document by Levy so as to pass the property in it to the plaintiff. The mere breach of an argeement on the part of Levy, assuming that it applied to the cargo in question, which is not alleged, gave no title to the plaintiff, after Levy's affairs were placed in liquidation, to have the bill of lading delivered up to him without payment of the value of the cargo. In *Chinnock* v. *Sainsbury* (1), where

(1) 6 Jur. (N.S.), 1318.

the owner of a collection of pictures agreed to deposit it with auctioneers in consideration of an advance of money from them, and further agreed that the amount of the advance should be deducted from the proceeds of the sale, but afterwards refused to deposit the whole of his collection with them, a bill for specific performance of the agreement was dismissed.

Benjamin, Q.C., for the plaintiff: The statement of claim shows an equitable title in the plaintiff to the bill of lading, and that the assignee of Levy took it subject to its previous hypothecation to the plaintiff; and the defendants, as agents of the assignee, can have no better title. In Fisher on Mortgages, vol. i, 2d ed., p. 128, it is said: "An agent who has advanced money or incurred liability on account of his principal is protected by a lien on the property in respect of which the advances were made, or on the produce of the sale of it." In *Bristow* v. *Whitmore* (1), where the master of a ship entered into a charterparty to carry troops, and stipulated on his own responsibility to make certain alterations in *the ship to enable him to carry troops, and [712 made the alterations, and paid money and drew bills to meet the expenses, it was held, the shipowner having adopted the charterparty, that the master was entitled to be repaid out of the freight the money which he had advanced. And in *Dean* v. *Byrnes* (2), where there was an agreement that the lender of money should be employed to sell sugar expected to arrive, and that he should be repaid out of the proceeds of the sugar, it was held that he had no lien upon the proceeds of sugar which was afterwards shipped to the representatives of the borrower; but this decision was expressly upon the ground that the sugar was not purchased with the money lent. Here the cargo was purchased by means of the advance, and there was a full and complete contract that the bill of lading should come to the hands of the plaintiff, and it was hypothecated to him by the very nature of the transaction.

Holl, in reply: In the present case there was no agreement with regard to the particular parcel of palm leaves in respect of which the bill of lading was given. There was nothing but a general agreement that the plaintiff should have a lien on goods to be shipped to him by Levy.

COCKBURN, C.J.: I should be very sorry if I were obliged to decide in favor of the defendants. The facts appear to be that, before the cargo of palm leaves was shipped, there

(1) 9 H. L. C., 391; 31 L. J. (Ch.), 467.

(2) 3 Moo. P. C. (N.S.), 92; 13 W. R., 299.

was a specific engagement between the plaintiff and Levy, the consignor, that the goods should be bought with money advanced by the plaintiff, and that the bill of lading should be forwarded to the plaintiff as a security for his advance; and as far as we can see, if Levy had not become bankrupt, the bill of lading would have been forwarded to the plaintiff in due course. Under these circumstances I cannot entertain a shadow of doubt that a court of equity would decree specific performance of Levy's agreement. It is further to be observed that this is not a case in which the rights of third parties intervene. Inasmuch, therefore, as it is no longer any objection in this court that the plaintiff's rights are equitable only, I think it is quite clear that he is entitled to judgment.

MELLOR, J.: I am of the same opinion. Whether the 713] money *was directly advanced for the purchase of this particular cargo or not, it seems clear that these goods were bought and shipped under an arrangement that the plaintiff should be paid his advances out of the proceeds of the sale of these goods in England. It was, therefore, the duty of Levy or his representatives to send the bill of lading to the plaintiff, and to no other person. What happened was, in fact, equivalent to a valid hypothecation of the bill of lading. I think we ought to carry out the original intention of the parties by enabling the plaintiff to recover possession of a document which ought to have been forwarded to him.

FIELD, J.: I am of the same opinion, though I have not been without doubt during the argument, not as to the principles upon which the case ought to be decided, but from the manner in which the facts are stated. If I had thought it clear that the goods were shipped upon the terms that they, or what represents them, the bill of lading, should stand as a security for the advances, I should have had no difficulty. But my doubt has been whether such an agreement is clearly stated upon the record. As, however, there are issues of fact upon the pleadings, and an agreement for an equitable pledge must be proved at the trial, or if it is not proved the plaintiff cannot succeed, this doubt is of less importance; and upon the argument of the demurrer, I cannot hold that the claim is a bad one.

Judgment for the plaintiff.

Solicitor for plaintiff: *A. G. Ditton.*
Solicitors for defendants: *Lyne & Holman.*

[1 Queen's Bench Division, 714.]

May 26, 1876.

*THOMAS v. BROWN. [714

Statute of Frauds—Vendor and Purchaser—Memorandum of Agreement—Description of contracting Party as "Vendor"—Deposit, when recoverable—Acquiescence.

The plaintiff signed a contract for the purchase of a leasehold shop from "the vendor," subject to particulars and conditions; and the auctioneer signed "as agent for the vendor." The plaintiff paid a deposit, and the vendor's solicitor forwarded to the plaintiff's solicitors an abstract of title, and in reply they wrote: "Without prejudice to any question which may arise as to the contract of purchase herein, we beg to name Tuesday next to examine abstract of title, with deeds," &c. And after examining the abstract they forwarded requisitions, writing at the foot of them, "The above requisitions are made without prejudice to any question which may arise as to the contract for the purchase of the premises." The plaintiff subsequently repudiated the contract, on the ground (*inter alia*), that the contract did not disclose the name of the vendor, and brought an action to recover the deposit:

Held, without deciding whether the memorandum was insufficient under the Statute of Frauds, that the plaintiff could not recover, having chosen, knowing that the vendor's name did not appear in the memorandum, to pay the deposit and receive the abstract of title; and that the expression in the correspondence, "without prejudice to any question which may arise as to the contract of purchase," could not have been meant or understood as referring to the validity of the contract.

Sale v. *Lambert* (Law Rep., 18 Eq., 1; 9 Eng. R., 661), and *Potter* v. *Duffield* (Law Rep., 18 Eq., 4; 9 Eng. R., 664), discussed.

Casson v. *Roberts* (31 Beav., 613; 32 L. J. (Ch.), 105) questioned.

INTERPLEADER ISSUE obtained in an action brought by the plaintiff against Croucher, an auctioneer, to recover a deposit.

The following case was stated for the opinion of the court:—

1. The defendant, previously to the 10th of May, 1875, had advertised a leasehold shop and premises at Hornsey Rise, Middlesex, to be sold by auction by E. E. Croucher, an auctioneer, at the mart in the city of London, on the 10th of May, 1875, under printed particulars and conditions of sale. Previous to the day of sale the plaintiff was in communication with the auctioneer as to the purchase of the premises, and received from him the particulars and conditions. In the particulars the property was described as "held under a lease dated the 5th of December, 1856, for an unexpired term of 80¼ years, and as leased to Mr. Miles, a draper, for the term of 21 years from the 26th of March, 1871."

*The following conditions of sale are material:— [715

"Sixth. The said lease and the counterpart of the underlease will be produced at the sale, and may be inspected at the office aforesaid during three days previous to the day

of sale, and no objection shall be taken to any matter contained in or omitted from the same lease or underlease. The production of the receipt for the rent last due shall be taken as conclusive evidence of the performance of insurance, and all other leases and covenants, in respect of the lot, up to the day of completing the purchase, whether the purchaser shall or shall not have had notice of any breach of any particular covenant, and the purchaser shall not object that any instrument is unstamped, or not sufficiently stamped, or to the non-registration of any deed or document in Middlesex, and no evidence of identity shall be required."

"Ninth. If any mistake be made in the description of the property, or any other error shall appear in the particulars of sale, such mistake or error (if capable of compensation) shall not annul the sale, but a compensation shall be allowed or given by the vendor or purchaser as the case may require; such compensation in case of dispute to be settled by arbitration in the usual way."

"Lastly. If the purchaser shall fail to comply with any of the above conditions, his deposit-money shall be forfeited to the vendor, who shall be at liberty (with or without notice) to resell the premises by public auction or private contract, without the necessity of previously tendering an assignment to the defaulter, and such new sale or sales may be made at such time or times, and subject to such conditions and in such manner in all respects, as the vendor shall think proper. And if on or after such resale there shall be any loss to the vendor, either by reason of a deficiency of price, or by reason of costs, charges, or expenses incurred by him, or both, the purchaser shall make good such loss to the vendor, as and for liquidated damages, and on any such resale by auction the premises offered for sale may be bought in, and all expenses of and attending an unsuccessful attempt to sell may immediately thereupon be recovered from the defaulter."

2. On the 10th of May, 1875, the plaintiff did not attend the sale at the mart, but she afterwards signed the following 716] contract, *which was partly printed and partly in writing, on the back of one of the printed particulars and conditions of sale:—

"Memorandum.

"I, the undersigned Hannah Thomas, of 3 Peter's Lane, West Smithfield, do hereby acknowledge that I have this day purchased the property described in the within particu-

lars, subject to the foregoing conditions of sale, at the price of seven hundred pounds, and that I have paid into the hands of the auctioneer the sum of seventy pounds as a deposit and in part payment of the said purchase-money; and I hereby agree with the vendor to pay the remainder of the said purchase-money to complete the purchase according to the within conditions of sale.

"As witness my hand the 10th day of May, 1875.

"(Signed) H. Thomas."

	£	s.	d.
Purchase-money . . .	700	0	0
Deposit-money paid . . .	70	0	0
Remaining to be paid . .	630	0	0

"As agent for the vendor I ratify this sale, and as auctioneer acknowledge the receipt of the deposit.

"Witness, A. N. Stuttard. Edwd. E. Croucher."

3. On or about the 15th of May, 1875, the following letter, and the abstract therein referred to, were received by Messrs. Keen & Rogers, the plaintiff's solicitors:—

"Herewith I send abstract of title. The deeds may be examined at my office at any time you may appoint.

"Jno. Frazer."

4. In reply Messrs. Keen & Rogers wrote:—

"15th May, 1875.

"Without prejudice to any question which may arise as to the contract of purchase herein, we beg to name Tuesday next at 2 o'clock to examine abstract of title, with deeds, on behalf of Mrs. Thomas."

5. From the abstract of title, it for the first time appeared that *the defendant was the owner of the property the [717 subject-matter of the contract of the 10th of May, 1875.

6. Messrs. Keen & Rogers having examined the abstract with the title deeds, on the 21st of May, 1875, wrote to the defendant's solicitor:—

"We forward you herewith a few requisitions on the title and shall be glad to receive your replies at your early convenience."

Accompanying, and at the foot of the requisitions above-mentioned, was a note as follows:—

"The above requisitions are made without prejudice to any question which may arise as to the contract for the purchase of the premises."

7. On the 22d of May, 1875, the defendant's solicitor wrote to the plaintiff's solicitors, "Herewith I return requisitions with answers."

8. On the 2d of July the defendant's solicitor wrote to the plaintiff's solicitors:—

"Please let me have draft assignment at your early convenience."

And on the 9th of July the defendant's solicitor wrote to the plaintiff's solicitors as follows:—

"Brown and Thomas,—I have just been informed by Mr. Croucher that your client does not intend to complete her purchase, please let me know whether my information is correct; if it is I shall immediately instruct counsel to draw bill for specific performance."

9. The plaintiff's solicitors repudiated the contract of the 10th of May, 1875, and on the 23d of July commenced an action against Croucher for the recovery of the £70 which had been paid to him by the plaintiff on the signing of the contract.

10. The defendant has always been ready and willing to assign the purchased property to the plaintiff in pursuance of the above contract, and no question has been raised on the answers to the requisitions, but one of the grounds of the repudiation was that the contract of the 10th of May, 1875, did not disclose the name of the vendor.

718] *The questions for the opinion of the court are, 1. Whether the contract of the 10th of May, 1875, is a valid contract. If the court shall be of opinion in the affirmative, the judgment is to be entered for the defendant. 2. If the court shall be of opinion in the negative, the second question is whether the plaintiff is entitled to recover back the deposit paid under the above circumstances.

May 20. *Fullarton* (*Holl* with him), for the plaintiff: The plaintiff is entitled to recover back the deposit, for it was paid upon an invalid contract. The memorandum signed by the plaintiff does not disclose one of the contracting parties, the vendor, either by name or description. It is only signed by the auctioneer as "agent for the vendor." Two recent decisions by the Master of the Rolls, *Sale* v. *Lambert* (1) and *Potter* v. *Duffield* (2), bear closely upon this point. In the first of these cases the particulars stated that the sale was by direction of the proprietor; but the name of the vendor did not appear. A memorandum indorsed on the particulars was signed by the auctioneer "on behalf of

(1) Law Rep., 18 Eq., 1. (2) Law Rep., 18 Eq., 4.

the vendor." It was held that the vendor was sufficiently described, and the memorandum sufficient. But in the second case, where the particulars did not disclose the vendor's name, and the auctioneer wrote at the foot of the memorandum, "confirmed on behalf of the vendor," it was held that the memorandum was insufficient, as the term "vendor" was not of itself a sufficient description of one of the contracting parties.

[MELLOR, J.: How does it lie in the mouth of the plaintiff to take this objection after she has accepted the abstract of title?]

The plaintiff has done nothing which deprives her of the right to contend that the Statute of Frauds has not been complied with. In *Commins* v. *Scott* (1) the Master of the Rolls followed his decision in *Potter* v. *Duffield* (2), saying that the court ought to be careful not to manufacture descriptions or to be astute to discover descriptions which a jury could not identify. The fact that the contract has been in part executed is no answer to the objection: *Cocking* v. *Ward* (3).

*J. *Thompson* (*Salter*, Q.C., with him) for the de- [719
fendant: The plaintiff cannot recover back the deposit. In Chitty on Contracts, 10th ed., p. 581, it is said, citing *Sweet* v. *Lee* (4), that the mere fact of one party having paid money to another, under a contract which he cannot enforce against the latter because of its non-compliance with the provisions of the Statute of Frauds, will not entitle the party who has paid such money to recover the same as on a failure of consideration.

[MELLOR, J.: It seems very hard that the purchaser should get back his deposit without being liable for the expenses. The deposit is a security for the performance of the contract.]

In *Ex parte Barrell* (5), it is laid down by the Lords Justices that, where the purchaser refuses to perform the contract, he cannot get back the deposit: *Hood* v. *Lord Barrington* (6), and Dart's Vendors and Purchasers, 5th ed., p. 218, support the decision of the Master of the Rolls in *Sale* v. *Lambert* (7). In *Depree* v. *Bedborough* (8), where the assignees in bankruptcy of the purchaser elected not to complete the purchase, it was held that the deposit was forfeited, though the conditions of sale contained no express provision as to forfeiture. This case is distinguish-

(1) Law Rep., 20 Eq., 11.
(2) Law Rep., 18 Eq., 4.
(3) 1 C. B., 858.
(4) 3 M. & G., 452.
(5) Law Rep., 10 Ch., 512.
(6) Law Rep., 6 Eq., 218.
(7) Law Rep., 18 Eq., 1.
(8) 4 Giff., 479; 33 L. J. (Ch.), 134.

able from *Casson* v. *Roberts* (1); where it was held that the purchaser was entitled to a return of the deposit, for there there was no agreement which could be enforced either at law or in equity.

Fullarton, in reply: First, the description "vendor" is not enough to identify the defendant. Secondly, with regard to the cases as to failure of consideration. *Depree* v. *Bedborough* (2) was a case where there was a perfectly good contract, which the purchaser failed to complete. *Carson* v. *Roberts* (3) is in point for the plaintiff, for there the reason why the deposit was held recoverable was that there was only a verbal contract.

Cur. adv. vult.

May 26. The following judgments were delivered:

MELLOR, J.: This is an interpleader issue to try the plaintiff's right to recover £70 paid by her as a deposit on
720] the purchase of *some leasehold property. The facts are stated in a case for the opinion of the court. [The learned judge stated the principal facts, and proceeded.] The two questions for our consideration are, first, whether the contract was a valid contract, and, secondly, if it was not, whether the plaintiff is, under the circumstances, entitled to recover back the deposit. I am of opinion that our judgment ought to be for the defendant. Several cases have been decided on the point now raised, particularly two cases which came before the Master of the Rolls: *Sale* v. *Lambert* (4) and *Potter* v. *Duffield* (5). In the first of these cases a memorandum of agreement was held to be sufficient within the Statute of Frauds, though the vendor was not described otherwise than as "the proprietor" of the premises, the Master of the Rolls saying that the term "proprietor" was an excellent description, and apparently holding that this word, with nothing else in the document to enlarge it, was quite sufficient. Now, comparing this decision with the later one, *Potter* v. *Duffield* (5), where the same learned judge held that the description "vendor" was insufficient, I have some difficulty in assenting to it. I think, however, that we ought to hold ourselves bound by the last of these two cases, holding that the word "vendor" is insufficient, though, as far as my judgment goes, I can see no distinction between the nature of the memorandum in either case. I think that the description which should enable us to dispense with the actual names of the parties ought to be very precise and exact, and that, in neither of the cases was this

(1) 31 Beav., 613; 32 L. J. (Ch.), 105.
(2) 4 Giff., 479; 33 L. J. (Ch.), 134.
(3) Law Rep., 18 Eq., 1.
(4) Law Rep., 18 Eq., 4.

requirement complied with. To allow so general a description to satisfy the statute seems to me to lead to all the mischief which it was intended to prevent, and I think that no description ought to be held sufficient except where it identifies the party without the necessity of resorting to parol evidence. However, it is unnecessary to consider whether these cases were or were not rightly decided, for I think that the defendant is entitled to our judgment on two grounds. The main object of the interpleader issue is to ascertain whether the £70 belongs to one or other of the two parties, and the case in Beavan's Reports, *Casson* v. *Roberts* (1), where it was held that a contract under similar circumstances *could not be enforced, is, I think, distin- [721 guishable, in spite of some strong expressions of Lord Romilly. Here, there are two answers to the claim to have the money paid back to the vendee. First, on the face of these conditions of sale it is obvious that the plaintiff paid the deposit knowing at the time that the name of the defendant did not appear on the memorandum of agreement otherwise than as "the vendor." She voluntarily paid the £70, with full knowledge that the vendor's name was not disclosed on the contract, and so far accepted the description as sufficient. Under these circumstances, I think she cannot recover back the money.

Secondly, under the fourth condition of sale (2) "the vendor shall, within seven days from the day of sale, deliver to the purchaser or his solicitor an abstract of title to the property purchased by him, subject to the stipulations contained in the conditions. And the purchaser shall, within seven days from the delivery of the abstract, deliver to the vendor's solicitor a statement in writing of his objections and requisitions (if any) to or on the title as shown by such abstract, and upon the expiration of such last-mentioned time the title shall be considered as approved of and accepted by the purchaser, subject only to such objections and requisitions (if any), and time shall be deemed to be as of the essence of this condition, as well in equity as at law." Now, what did the plaintiff do? If she had intended to insist on her right to rescind the contract on the ground that the memorandum was insufficient, it was her duty to send back the abstract, saying, "Why do you send this to me?" She, however, does not send it back, but keeps it, and her solicitors write this letter: "Dear sirs,—Without prejudice

(1) 31 Beav., 613; 32 L. J. (Ch.). 105.

(2) This condition was not set out in this case, but a copy of the conditions was by consent referred to during the argument.

to any question which may arise as to the contract of purchase herein, we beg to name Tuesday next at two o'clock, to examine abstract of title with deeds, on behalf of Mrs. Thomas."

Now I cannot conceive anything more unlikely than that a solicitor would allow his client's title deeds to be examined while there was a doubt as to the validity of the contract of sale. But the plaintiff's solicitors proceed to examine the abstract, and learn from it the name of the vendor. Then they keep the abstract in their possession, as if the only
722] question which could arise was as to the title, *and write a letter inclosing requisitions as to the title, putting at the foot of the requisitions the words "The above requisitions are made without prejudice to any question that may arise as to the contract for the purchase of the premises." I take the word "objection" to mean any unforeseen objection to the title which the plaintiff's solicitors did not wish to be taken to have waived. The requisitions are returned with answers, the correspondence goes on, and finally, on the 9th of July, the defendant's solicitor writes that he has been informed that the plaintiff does not intend to complete her purchase and that if this be true he shall take proceedings. To this the plaintiff's solicitors reply repudiating the contract.

Now I feel no doubt that the case comes within the rule laid down in *Cornish* v. *Abington* (1), that, "if any person by actual expressions, or by a course of conduct, so conducts himself that another may reasonably infer the existence of an agreement or license, and acts upon such inference, whether the former intends that he should do so or not, the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct." I think this is an express authority which quite justifies us in holding that it does not lie in the mouth of the vendee, who has accepted a contract like this, afterwards to object to it. For this reason I think we cannot say that the contract is invalid.

Then there is a second answer. In an action like the present, for money had and received, the plaintiff can only recover money paid without knowledge of the real facts—in ignorance of facts which, if they had been known, would have left the plaintiff an option whether she would pay or not. The rule is laid down by Patteson, J., in *Duke of Cadaval* v. *Collins* (2), that money paid under compulsion of law cannot be recovered back as money had and received;

(1) 4 H. & N., 549; 28 L. J. (Ex.), 262. (2) 4 A. & E., 858.

and, further, "where there is *bona fides* and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back." It is unnecessary to allude to the difference between ignorance of the law and ignorance of the facts. Now, is there anything unconscientious in the defendant keeping this money? I can see nothing. The breaking *off of the agreement was not in [723 any sense the fault of the vendor. He was always ready and willing to complete the purchase and execute a conveyance, but the vendee chooses to set up this question about the Statute of Frauds, and to say, "Although I can have the contract performed if I please, I repudiate it." Under these circumstances, I think it would be quite monstrous if the plaintiff could recover, and I am glad to think that the authorities are all opposed to her claim.

QUAIN, J.: I am of the same opinion. I do not propose to discuss the cases which have been cited; I will merely say that I have great difficulty in reconciling the two decisions of the Master of the Rolls. But I decide this cause on the ground that it is an action by an unwilling vendee against a willing vendor, and that it cannot be said that the consideration has failed so as to entitle the plaintiff to recover. By the 10th paragraph of the case it appears that the defendant has always been ready and willing to assign the purchased property to the plaintiff in pursuance of the contract; in short, to give the plaintiff all that was bargained for. Now where, upon a verbal contract for the sale of land, the purchaser pays the deposit and the vendor is always ready and willing to complete, I know of no authority to support the purchaser in bringing an action to recover back the money. Secondly, we must consider the peculiar position of the parties as disclosed by the correspondence. It appears that after the purchaser received the abstract the solicitors examined it with the deeds and made requisitions. These were acts which assumed that a contract existed, and yet the plaintiff now proposes to take proceedings upon the footing that there was no contract at all. It will, no doubt, be said that everything was done "without prejudice to any question which might arise as to the contract of purchase," and that this reservation having been assented to, the defendant is bound by it. But, in my opinion, the words "without prejudice to any question which may arise" mean any question in the execution of the contract, and not any question as to the existence of the contract. I think that no solicitor would understand the plaintiff as reserving any question as to the existence of the contract. Under such

circumstances the plaintiff is not entitled to recover the
724] *deposit. With regard to the case of *Casson* v. *Roberts* (1), I do not think that it has much bearing upon the present question, but I must say that I do not think the reasons upon which it proceeded are satisfactory.

Judgment for the defendant.

Solicitors for plaintiff: *Keen & Rogers.*
Solicitor for defendant: *John Fraser.*

(1) 31 Beav., 613; 32 L. J. (Ch.), 105.

See 16 Eng. Rep., 346 note.

By the terms of a written contract, R. was to furnish B. at least 200,000 feet of lumber before August 1, and B. was to pay R., on account of the contract, $2,000 on the first of August. R. having failed to furnish the 200,000 feet before Aug. 1, and having refused to go on and perform his contract, B. had the right, if he saw fit, to treat the contract as at an end, and to refuse to make the $2,000 payment. B. having elected to treat the contract as at an end, held R. must recover for the lumber furnished, upon an implied contract upon the part of B. to pay the value of the quantity of lumber received and kept by him: Robson *v.* Bohn, 22 Minn., 410.

A., the owner of certain real estate, in order to procure means to purchase certain other real estate of B., would be compelled to dispose of his own real estate, which could only be done at a great sacrifice, of which he informed B. B. verbally agreed with A., that, if the latter would so dispose of his property and apply the proceeds of such sale to purchasing B.'s real estate, he, B., on a certain day, for a fixed price, would sell and convey his real estate to A. The latter thereupon disposed of his real estate, making such sacrifice, tendered to B. the proceeds of such sale, demanded of him that he so convey his said real estate to A., and, upon B.'s refusal to so sell and convey, brought an action for damages for breach of such agreement:

Held, on demurrer for want of sufficient facts, that B.'s agreement to convey was within the statute of frauds, and that such action could not be maintained:

Held, also, that A.'s disposal of his property, at such sacrifice, was not such a part performance as would take B.'s agreement out of the operation of such statute: Parker *v.* Heaton, 55 Ind., 1.

[1 Queen's Bench Division, 730.]

June 27, 28, 1876.

730] *THE QUEEN v. ASPINALL and Others (1).

Conspiracy—Sufficiency of Indictment—Fraudulently obtaining settling Day for Shares of new Company—Official List of Stock Exchange.

In an indictment for conspiracy, the first count stated that the undertaking called "The Stock Exchange" was managed by a committee for general purposes, who had adopted rules and regulations for the conduct of business on the Stock Exchange, and that the defendants were respectively directors, secretary, and promoters of the E. Company, Limited, a new company which had proposed to raise a capital of £35,000 by subscriptions of shares of £1 each in addition to £15,000 represented by 15,000 fully paid-up shares. That by the rules and regulations of the Stock Exchange all persons dealing in the shares of a new company required, for the purpose

(1) See Same Case, with indictment set out at length, 12 Cox's Criminal Cases, 231.

of making their contracts enforceable according to these rules and regulations, that a special settling day should be fixed by the committee for general purposes, upon which day all shares which had been theretofore bought and sold should be delivered and paid for, &c. That application had been made on behalf of the defendants to the committee to appoint a settling day for transactions in the shares of the company, and that it became necessary that the company should comply with certain rules duly issued by the committee, to the effect, first, that a settling day would be appointed, provided that no allegations of fraud be substantiated, that there had been no misrepresentation or suppression of material facts, &c. Secondly, that, previous to such application being submitted to the committee, production of the following documents should be required—the original applications for shares, together with the allotment book signed by the chairman and secretary to the company, and a certificate signed in like manner stating the number of shares applied for and unconditionally allotted, and the amount of deposits paid thereon. Averment, that the defendants conspired to deceive Z. and others, the committee for general purposes, and to induce them to appoint a settling day, and falsely pretended to them that the number of shares of the company applied for by the public was 34,365, and the amount received on application £17,182 10s.; that 15,000 of the shares of the company had been allotted to the patentee, and that no shares of the company had been conditionally allotted; whereas no shares had been applied for by the public, the greater number of the shares had been allotted to the applicants upon condition *that they should not be called on to pay for them, and whereas nothing had [731 been received by the company upon the application for the shares; and 15,000 fully paid-up shares had not been taken by the patentee, &c.

Second count: That defendants were respectively directors, secretary, and promoters of the E. Company, Limited, and that application had been made on behalf of the company to the committee for general purposes of the Stock Exchange to order the quotation of the company in the official list of the Stock Exchange under a rule duly issued by the committee, to the effect that the committee would order the quotation of a new company in the official list, provided that the company was of *bona fide* character, &c.; that the requirements of the second of the rules mentioned in the first count had been complied with—that two-thirds of the whole nominal capital proposed to be issued (shares reserved or granted in lieu of money payments to concessionaires, owners of property, or others not being counted in such two-thirds) had been applied for and unconditionally allotted to the public—and that a member of the Stock Exchange is authorized by the company to give full information as to the formation of the undertaking, and able to satisfy the committee as to all particulars they may require. Averment, that the defendants requested a firm of stock-brokers to give the information before mentioned, and to apply to the committee to order the quotation of the shares of the company in the official list, and employed the brokers to sell 5,000 shares of the company on behalf of alleged vendors of patents, and that the defendants conspired to deceive the committee, and to induce them, contrary to the true intent and meaning of the rules mentioned in this and the first count, to order a quotation of the shares of the company in the official list of the Stock Exchange, and thereby to induce and persuade divers of the Queen's subjects, who should themselves buy and sell the shares of the company, to believe that the company was duly formed and constituted, and had in all respects complied with the rules of the Stock Exchange, so as to entitle the company to have their shares quoted in the official list. And that the defendants, in pursuance of the conspiracy, falsely pretended to Z. and others, members of the committee, that the number of shares applied for by the public, &c. (repeating the false pretences mentioned in the first count), and did thereby induce the committee to order the shares to be quoted in the official list after the 28th of May, 1874.

At the trial the jury found that the defendants were guilty of obtaining a settlement on the Stock Exchange by false and fraudulent means, and a verdict of guilty was entered:

Held, on a motion in arrest of judgment (Cockburn, C.J., doubting) that the second count was good, as it must be taken by necessary inference to allege that the object of the conspiracy was, not merely to obtain a settling day and official quotation upon the Stock Exchange, and so to induce persons to believe that the company was

duly formed and constituted, but also to induce persons to act on that belief and to deal in the shares of the company:

Semble, per Cockburn, C.J., that the first count was defective, as it did not show any conspiracy to defraud the public.

INDICTMENT against Joseph Aspinall, William Whyte, Charles Knocker, John Saunders Muir, and two others. First count: That by a deed made and dated the 27th of 732] March, 1802, an *undertaking was proposed to be carried on thenceforth in a building then erected near Throgmorton Street, City, for the transacting of buying and selling the public stocks or funds of this kingdom, and a capital sum of £20,000 had then been subscribed for setting on foot and carrying on the said undertaking under the name of "The Stock Exchange," and was then divided into 400 shares of £50 each, and nine persons were then appointed trustees and managers of the undertaking, and due provision was then made for election of trustees and managers from among the proprietors of the undertaking, to fill up vacancies, so that there should be nine such trustees and managers. And for the management and transacting the concerns of the undertaking, thirty persons had, previous to March 27, 1802, been chosen by ballot at a general meeting of the proprietors, a committee for general purposes, and due provision was then made for an annual election by ballot of thirty proprietors of "The Stock Exchange," to act for the term of one year as aforesaid, and the committee for general purposes were thenceforth empowered to have the sole management, regulation, and direction of all the concerns of the undertaking, except the treasurership thereof and the direction and management of the buildings; and were empowered to admit such persons, whether proprietors or not, as they should think proper, to attend and frequent the building called the Stock Exchange, for the transacting therein the business of a stock-broker or jobber for one year, to be computed from the 25th of March in each year, and at a price of admission fixed by the trustees and managers aforesaid. And that from and after the date of the deed and at the time of the taking the inquisition, the management, &c., of the concerns of the undertaking, except as aforesaid, had been and were carried on by the committee for general purposes of the Stock Exchange, and who had from time to time adopted rules and regulations for the conduct of business on the Stock Exchange, which were in full force and effect in respect of the members of the Stock Exchange and Stock Exchange transactions, and the committee for general purposes had full

power and authority to expel any member of the Stock Exchange who violated any of the regulations so adopted, or failed to comply with any of the decisions of the committee. Averment, that heretofore J. Aspinall *and W. [733 Whyte had been directors of a public company called The Eupion Fuel and Gas Company, Limited, and one G. P. Knocker had been the secretary and public officer of the company, and S. G. Fry, J. S. Muir, and C. Knocker had been persons aiding and assisting in the establishment of the company, and that the company had proposed to raise a capital of £35,000 by subscriptions of shares of £1 each in addition to £15,000 represented by 15,000 fully paid-up shares, for the purpose of carrying out the objects of the company, and that the company was in all respects a new company. And that all persons dealing in the shares of a new company, according to the rules, regulations, and usages of the Stock Exchange, when such new company had not yet received the appointment of a special settling day in respect of the transactions in the shares of such new company, required, for the purpose of making their contracts and bargains in respect of the shares enforceable according to the rules and regulations of the Stock Exchange, that a special settling day should be fixed by the committee for general purposes of the Stock Exchange, upon which settling day all shares which had been theretofore bought and sold should be delivered and paid for according to the rules, regulations, and usages of the Stock Exchange. And that on April 1, 1874, an application had been made by and on behalf of Aspinall, Whyte, G. P. Knocker, Fry, Muir, and C. Knocker, to the committee for general purposes of the Stock Exchange, to appoint a special settling day for transactions in the shares of the company, and thereupon it became and was necessary that the company should comply with the terms of certain rules duly issued and published by the committee, and which rules were and are as follows: "127. The committee will appoint a special settling day for transactions in the shares of a new company, provided that no allegation of fraud be substantiated; that there has been no misrepresentation or suppression of material facts; that sufficient scrip or shares are ready for delivery; and that no impediment exists to the settlement of the account. 128. The secretary to the share and loan department shall give one week's notice to the Stock Exchange of any application for a special settling day for transactions in the shares of a new company previous to such application being submitted to the committee, and

734] shall require the production of the following *documents, viz., the prospectus, the act of Parliament, the articles of association, or a certificate that the company is constituted upon the cost book system under the Stannary laws; the original applications for shares, together with the allotment book signed by the chairman and secretary to the company, and a certificate signed in like manner, stating the number of shares applied for and unconditionally allotted, and the amount of deposits paid thereon; the banker's pass book and a certificate from the bankers, stating the amount of deposits received." And that Aspinall, Whyte, G. P. Knocker, Muir, C. Knocker and Fry, knowing the premises, and contriving and intending to cheat and defraud, had on the 3d of February, 1874, unlawfully conspired, combined, confederated, and agreed together, and with divers other persons, to the jurors unknown, by divers false pretences, &c., to injure, deceive, prejudice, and defraud S. De Zoete, T. Fenn, and others, then being members of the committee for general purposes of the Stock Exchange, and to induce them, contrary to the true intent and meaning of the rule hereinbefore recited, to appoint a special settling day on the Stock Exchange for transactions in the shares of the company. And that Aspinall, Whyte, G. P. Knocker, Muir, C. Knocker, and Fry, in pursuance of the unlawful conspiracy. &c., unlawfully and knowingly did falsely pretend to S. H. De Zoete, T. Fenn and others, then being members of the committee for general purposes of the Stock Exchange, that the number of shares of the company applied for by the public was then 34,365, that the number of shares of the company allotted unconditionally was then 34,365, and that the amount received by the company thereon was, on application, 10*s.* per share, amounting to the sum of £17,182 10*s.*, that 15,000 of the shares of the company had then been allotted to the patentee, and that no shares of the company had been conditionally allotted, whereas in truth and in fact, the number of shares of the company applied for by the public was not then 34,365, nor any number, and whereas the number of shares allotted unconditionally was not then 34,365; but the greater part of the shares had been allotted to the applicants for the same upon the condition that they, the applicants, should not be called upon to pay for the same, and whereas the amount received by the company upon the 735] application for the shares was not *£17,182 10*s.*, nor was any amount whatever received by the company from applicants for shares, and whereas 15,000 fully paid-up

shares of the company had not been taken by the patentee, &c.

Second count: That at the time of committing the offence thereinafter mentioned, Aspinall and Whyte were directors and G. P. Knocker secretary of the Eupion Fuel and Gas Company (Limited), and Fry, Muir, and C. Knocker were persons aiding and assisting in the establishment of the company, and applications had been made on behalf of the company to the committee for general purposes of the Stock Exchange to order the quotation of the new company in the official list of the Stock Exchange, under and in pursuance of a rule duly issued and published by the committee, as follows: "129. The committee will order the quotation of a new company in the official list, provided that the company is of *bona fide* character and of sufficient magnitude and importance; that the requirements of rule 128 have been complied with, and that the prospectus has been publicly advertised, and agrees substantially with the act of Parliament or the articles of association, and, in the case of limited companies, contains the memorandum of association; that it provides for the issue of not less than one half of the nominal capital, and for the payment of ten per cent. upon the amount subscribed; and sets forth the arrangements for raising the capital, whether by shares fully or partly paid up, with the amounts of each respectively, and also states the amount paid or to be paid in money or otherwise to concessionaires, owners of property, or others, on the formation of the company, or to contractors for works to be executed, and the number of shares, if any, proposed to be conditionally allotted; that two-thirds of the whole nominal capital proposed to be issued (shares reserved or granted in lieu of money payments to concessionaires, owners of property, or others, not being counted in such two-thirds) have been applied for and unconditionally allotted to the public; that the articles of association restrain the directors from employing the funds of the company in the purchase of its own shares, and that a member of the Stock Exchange is authorized by the company to give full information as to the formation of the undertaking, and able to satisfy the committee as to all particulars they may require. In cases where fully paid-up shares have been *granted in [736 lieu of money payments, an official certificate will be required that the contract providing for the issue of such shares has been filed with the registrar of joint stock companies, as prescribed by the 25th section of the Companies Amendment Act, 1867," &c. Averment, that the defendants

had applied to and requested one Sir R. W. Carden and others, a firm of stock-brokers and members of the Stock Exchange, and authorized them to give the information hereinbefore mentioned, and to apply to the committee to order the quotation of the shares of the company in the official list of the Stock Exchange, and G. P. Knocker had employed them to sell 5,000 shares of the company on behalf of certain alleged vendors of patents, and they had bargained for the sale of 300 of the shares. And that Aspinall, Whyte, G. P. Knocker, Muir, C. Knocker, and Fry, did, on the 3d of February, 1874, unlawfully conspire, combine, confederate, and agree together, and with divers other persons whose names were to the jurors unknown, by divers false pretences, &c., to injure and deceive the said members of the committee, and to induce them, contrary to the true intent and meaning of the rules in this count and in the first count of the indictment mentioned, to order a quotation of the shares of the company in the official list of the Stock Exchange, and thereby to induce and persuade divers of the liege subjects of our Lady the Queen, who should thereafter buy and sell the shares of the company, to believe that the company was duly formed and constituted, and had in all respects complied with the rules and regulations of the Stock Exchange, so as to entitle the company to have their shares quoted in the official list of the Stock Exchange. And that Aspinall, Whyte, G. P. Knocker, Muir, C. Knocker, and Fry, and the other persons, &c., in pursuance of the unlawful conspiracy, combination, confederacy, and agreement, unlawfully and knowingly did falsely pretend to De Zoete, Fenn, and others, members of the committee, &c., that the number of shares of the company applied for by the public was then 34,365, and that the amount received by the company thereon was on application 10*s.* per share, amounting to the sum of £17,182 10*s.*; that 15,000 of the shares had then been allotted to the patentee, that no shares had been conditionally allotted; and did thereby induce the 737] committee for general purposes *of the Stock Exchange to order the shares to be quoted in the official list of the Stock Exchange on and after the 28th of May, 1874.

At the trial before Cockburn, C.J., at the last Hilary sittings in London, it appeared that in March, 1874, the defendant Muir had promoted a company for the manufacture of gas from oil, called "The Eupion Fuel and Gas Company, Limited," with a capital of 50,000 shares of £1 each. The defendant C. Knocker was cousin to G. Knocker, the secretary of the company, and he was also general manager of

the Midland Banking Company. C. Knocker applied in March, 1874, to a member of the firm of Sir R. W. Carden & Co., stock-brokers, and asked him to procure a special settling day for the company on the Stock Exchange. There is a settling day each fortnight on the Stock Exchange for transactions in ordinary stocks and shares, but in the case of a new company application has to be made to the committee for a settling day, and if the documents and evidence produced on behalf of the company are considered satisfactory, a special day is appointed to settle transactions in it, after which day they are disposed of on the regular settling days. Before a special settling day is appointed, transactions in the shares of a new company cannot be enforced through the committee of the Stock Exchange. The rules of the Stock Exchange as to the documents, &c., required upon application for a settling day are stated in the first and second counts of the indictment. It was arranged that the secretary of the share and loan department of the Stock Exchange should write to the secretary of the company for the proper documents. In reply, a certificate was sent that the number of shares applied for was 34,365; that the number of shares allotted unconditionally was 34,365, and the amount received on application, 10*s.* a share, £17,182 10*s.*; that the number of shares taken by the patentee was 15,000 (fully paid up); that no shares were conditionally allotted; that the shares were ready for delivery, and no impediment existed to the settlement of the account. The pass book of the company's bankers, and the allotment papers and allotment book were sent in support of these statements. In fact, there did not appear to have been a single *bona fide* application for shares, but a number of persons were induced by Aspinall and Whyte, who were the committee for superintending the allotment, *to write applications for [738 shares, upon the understanding that they should not be called upon to pay for them, and the shares, as they received them, were handed back to Aspinall. In order to make it appear that the deposits on these allotments were paid, Muir obtained an advance of £3,000 from the Midland Banking Company, through the agency of C. Knocker, and from this sum the deposits were paid to the credit of the Eupion Gas Company at their bankers, the money being afterwards paid back to the Midland Banking Company, and the operation repeated again and again until a sum equal to the whole amount of the deposits had been paid into the bank to the credit of the Eupion Company. On the 26th of May a special settling day in the shares of the company was fixed for

the 28th, and after the 28th a quotation of the shares in the official list was ordered to appear. In April G. Knocker had instructed a broker to sell a number of shares in the company, which he said were retained by the patentee. Part of these shares were sold for the special settlement, whenever it should be fixed. The name of Aspinall was given in as the vendor of certain of the shares. After the settling day had been appointed, in September, Aspinall and C. Knocker purchased, through town and country brokers, large numbers of the shares, to the amount of £19,000, and upon non-delivery claimed to make the brokers personally responsible. The defendant Muir was proved to have been seller of part of these shares. At the time of these transactions the whole of the shares of the company, with the exception of three, were in Aspinall's name.

The jury found that it had not been proved that the defendants were engaged in a combination to buy or sell shares on the Stock Exchange for the purpose of defrauding the brokers, but that Aspinall, Whyte, Muir, and C. Knocker were guilty of obtaining a settlement on the Stock Exchange by false and fraudulent means.

A verdict of guilty was entered against them on the first and second counts, with leave to move to enter the verdict for the defendants.

A rule was obtained accordingly, and also to show cause why judgment should not be arrested, or why a new trial should not be had, on the ground that the verdict was against the evidence, and that the facts as proved, or as found by the jury, as alleged in the indictment, did not amount to an indictable conspiracy.

739] *June 27. Sir *H. Giffard*, S.G. (*Poland* and *Besley*, with him), showed cause: It must be taken, after verdict, that the offence charged in the first and second counts was duly proved, and the question is whether either of these counts discloses an indictable offence. With regard to the first count, it shows a conspiracy to obtain a certificate or testimonial from a public body by false evidence. In *British and American Telegraph Company* v. *Albion Bank* (1), where a settling day was obtained under circumstances similar to these, Bramwell, B., in delivering judgment, said: "The object was that the bank might certify to the committee of the Stock Exchange that the requisite amount of shares to get a settling day had been applied for and paid in. . . Now, it is necessary for the purposes of our judgment and right, that it may not be supposed that our

(1) Law Rep., 7 Ex., 119.

opinion is otherwise, that we should say that the scheme we have mentioned was fraudulent and illegal, and brought the parties to it within the criminal law."

[COCKBURN, C.J.: There the question was whether an action could be brought, and the observations of the learned Baron were not necessary for the decision.]

It must be presumed that the conspiracy to obtain a false character was for the purpose of defrauding the public. The second count, at any rate, is not open to objection. In *Rex* v. *De Berenger* (1) it was held that it was an indictable offence to conspire by false rumors to raise the price of the public government funds with intent to injure the king's subjects who should purchase, and that the indictment need not specify the particular persons who purchased or the persons intended to be injured; Lord Ellenborough saying, "The crime lies in the act of conspiracy and combination to effect that purpose, and would have been complete although it had not been pursued to its consequences, or the parties had not been able to carry it into effect." Here it is alleged, in substance, that the intent was to have the shares quoted in the official list, and to induce those who should buy and sell the shares to believe that they were different from what they actually were.

[BLACKBURN, J.: In *Rex* v. *De Berenger* (1) it was charged that the intent was to raise the price of stock. Here it is not *in terms alleged that the intent was to raise the [740 value of the shares.]

The effect of the conspiracy is the same.

[COCKBURN, C.J.: Is it sufficiently charged that people were induced to purchase the shares by the belief that they were worth more than they really were worth?]

This is the obvious effect of procuring the shares of the company to be quoted in the official list of the Stock Exchange.

Ballantine, Serjt. (*W. Ballantine* with him), for C. Knocker, *Pope*, Q.C., and *Metcalfe*, Q.C., for Aspinall, *A. Collins* and *Hodson*, for Whyte, and the defendant Muir in person, showed cause: The first and second counts are bad. There is nothing to show that the result of obtaining a settling day is to enhance the value of the shares in the company. It can only give facilities for dealing in the shares, and if the promoters of a company, which they believe will ultimately succeed, arrange to do something in order to start it, without intending to injure any one, this is not an indictable conspiracy.

(1) 3 M. & S., 67.

[BLACKBURN, J.: Is not a conspiracy to induce buyers of shares to believe, contrary to the fact, that the capital has been duly subscribed, a criminal offence?]

It is merely alleged that the intent was to induce those who might buy or sell shares to believe that they were really subscribed for and the deposits paid.

[BLACKBURN, J.: To believe this before they purchased the shares. Surely the majority of people, seeing the shares quoted in the lists, would suppose that the rules had been complied with.]

There is another object which is quite legitimate, that of obtaining the enforcement of bargains by the Stock Exchange committee. A conspiracy to give a false character to a servant would not be indictable unless with the express object of obtaining a situation for the servant.

[FIELD, J.: With what other object could a false character be obtained?]

No specific questions were put to the jury as to whether the object of the defendants in obtaining the settling day was to defraud brokers or dealers in the shares.

741] *[They referred to *Reg.* v. *Gill* (1); *Sydserff* v. *Reg.* (2); *Rex* v. *Seward* (3).]

COCKBURN, C.J.: I think the rule ought to be discharged, although I have entertained very considerable doubt as to the sufficiency of these counts upon which the jury have found the defendants guilty, and am still of opinion that the first count is defective, although, perhaps, it is not necessary to dwell upon it from the view we take as to the other. The first count alleges simply that the defendants entered into a conspiracy (I am stating it shortly) to induce the committee of the Stock Exchange to grant a settling day and a quotation of the shares of this company by fraudulent representations. There it stops. Had it gone on to say that the ulterior purpose of the defendants was, by getting the settlement day and the quotation, to defraud the public, I think the count would have been good. By "the public" I mean those who were disposed to buy shares in the company. But the count stops there, and I must say I think it is bad.

Now with regard to the second count, which we are of opinion is sufficient, I confess it is not without much hesitation and doubt that I arrive at that conclusion. The count states in substance, after reciting various circumstances, which it is unnecessary to refer to, that the defendants entered into this conspiracy in order to obtain a

(1) 2 B. & Ald., 204. (2) 11 Q. B., 245. (3) 1 Ad. & E., 706.

quotation of the shares in the Stock Exchange list, to induce persons who should thereafter buy and sell the shares to believe that the company was duly formed and constituted, and had complied with the rules of the Stock Exchange so as to entitle the company to have their shares quoted in the official list. If it had gone on to say that the purpose, for which that belief was sought to be produced in the minds of the persons buying and selling those shares, was to injure them by inducing them to buy shares which were either valueless or, at all events, inferior in value to what they appeared to be, I should have no hesitation whatever in saying that the count was sufficient in point of law. My doubt has been whether the statement that the object of the company was to induce persons to believe, without going on to say *that it was to induce them, [742 acting on that belief, to buy shares, was sufficient, and I should have had more doubt, but for the allegation that it was to induce this deceptive belief in persons who should thereafter buy and sell the shares. I think, on the whole, it is sufficient, because it is difficult to see how that belief, if engendered in the minds of persons buying and selling shares of this company, could have any other effect than that of inducing them to buy and sell under circumstances in which they would not otherwise have bought and sold. Difficult as it is to see how the belief could have any other operation, I think the statement being that the conspiracy was to induce that belief, it must be taken to mean to induce that belief in order to lead persons to deal with those shares, when they would not otherwise have so dealt with them. Upon the whole, therefore, although not without considerable hesitation, I come to the conclusion that this statement is sufficient.

With regard to the question, whether the offence if sufficiently alleged in the indictment was proved, I can entertain no doubt. Having the evidence in my mind, I cannot accede to the proposition that the facts were not sufficient to make out an indictable offence. The facts undoubtedly were that persons were induced to take shares which they never intended to have, except fictitiously, which shares were to be made over to the principal person dealing in this transaction, namely, Mr. Aspinall; that these allottees were perfectly fictitious; and then that the funds of the company, instead of being real, were fictitious also, a small sum being borrowed from the bank, and that sum so manipulated as by degrees to represent the capital of this company as paid up, when in point of fact the whole thing was

a fiction from beginning to end. This was done for the purpose of obtaining the settlement day and quotation on the Stock Exchange. That that was a fraud on the committee of the Stock Exchange no one can for a single moment doubt, and I must say a scandalous fraud. Then the question is, what was the intention? The company had nothing but its shares; it had no capital whatever; and the only object one can see of getting the company on the Stock Exchange was that the shares might be dealt in. I think the offence is one that is made out.

743] *BLACKBURN, J.: I am also of opinion that on the evidence there could be no doubt that an indictable offence was adequately proved. Whether it is sufficiently averred in the indictment is a question that I must say a word about presently. I think ever since the case of *Rex* v. *Berenger* (1) it has been perfectly established that, whatever other things may be indictable or not, this is indictable, namely, where parties by false pretences and fraudulent representations and lies enter into a conspiracy together by those means to raise the price of any vendible commodity; and although *Rex* v. *Berenger* (1) was a case relating to the public funds, yet the doctrine of the court goes further, and extends to any vendible commodity, where the intent is to induce belief produced by lies in order that the purchasers in the market may give higher prices than they otherwise would give. A conspiracy to produce this result by false means, so as to injure the public, is an indictable offence. Here it is proved there was a conspiracy by false means to procure a settling day and a quotation on the Stock Exchange. The conspiracy was in procuring these things for the purpose of inducing those who should deal on the Stock Exchange and see the quotation, and, consequently, who would deal in those shares, to believe that the company had been proved to the satisfaction of the Stock Exchange to be a real company started to this extent, that the rules of the Stock Exchange had been complied with; so that in consequence of that belief they should think the company was a better company than it really was: the company in fact being one which was not genuine, in which the calls had not been paid, the shares never allotted, and altogether such a company that, if the truth had been known, it never would have been allowed to get on the Stock Exchange. I say all that was done, and I cannot doubt that was a confederacy and a conspiracy with a view that on the settling day being allowed, and the quotation being per-

(1) 3 M. & S., 67.

mitted, persons dealing on the Stock Exchange should believe that the shares in this particular company were of a greater value than they really were; and that the intention was that dealers should be influenced in the price they should give, I cannot doubt. It was amply proved there was a real conspiracy to do this particular thing.

*I say nothing about the first count as to its being [744 good or bad, but undoubtedly a few words put in would have made it good. I pass by that, because the second count goes further, and there are more averments than in the first, and we will see whether on the face of the second count the offence is sufficiently laid. Now that count, after referring to the rules of the Stock Exchange, and showing that a quotation on the Stock Exchange does import into it a representation to the public that the Stock Exchange has authorized the shares to be quoted, and has had proved to it, according to its regulations, that the company is of a particular description and quality, then proceeds: "The jurors say that the defendants did combine, confederate, and agree together with divers other persons whose names are to the jurors unknown, by divers false pretences . . . to injure and deceive the members of the committee, and to induce them, contrary to the true intent and meaning of the rules," &c., "to order a quotation of the shares of the said company in the official list of the Stock Exchange." Had it stopped there I am not certain that it would have been sufficient to show there was such an object in the conspiracy as to induce the public to buy. I do not say how it would have been, and it is not necessary to consider. But it goes on further, "and thereupon to induce and persuade divers of the liege subjects of our Lady the Queen, who should thereafter buy and sell the shares of the company," that is, future purchasers, dealers in the company, "to believe that the company was duly formed and constituted, and had in all respects complied with the rules and regulations of the said undertaking." Here it stops. Had it gone on and added, "and consequently from the belief that this company was of a different and better quality than it really was to induce sales to be more readily made at a higher price than they were before," the count would have been identical with that in the case of *Rex* v. *Berenger* (1). But those words are left out, and the question is, whether, upon the averments here, we ought to say that, if the effect of the conspiracy was to induce, by false representations, all persons who deal in a particular article in a par-

(1) 3 M. & S., 67.

ticular market to believe that that article is of a better quality and different to what it really is, then it necessarily follows
745] *from that that there was a conspiracy to induce them to enter into bargains which they would not otherwise have entered into, or more readily, or at higher prices than they otherwise would have done. It has been argued that the jury should have been specifically asked questions on this subject, but I do not think so. I find that Lord Ellenborough in the case of *Rex* v. *Dixon* (1), speaking of the motion in arrest of judgment, said: "It was an universal principle that when a man is charged with doing an act of which the probable consequence may be highly injurious, the intention is an inference of law." Then he says, "Here it was alleged that the defendant delivered the loaves (which were adulterated) for the use and supply of the children, which could only mean for the children to eat." Here, I say, we should be going a great deal too far in wresting words from their plain meaning, and going further than any cases that I have heard of, if we were to say the intention to obtain a quotation on the Stock Exchange, in order to induce persons who buy and sell shares in the company to believe the company was a good company, when in fact it was a bad company, was not an object the consequence of which must necessarily be injurious to those buying and selling. It is, therefore, an inference of law that in doing this act they intended to produce its necessary consequences, namely, that dealers should buy and sell at the higher prices, and so the count alleges quite sufficient in my mind to describe the exact offence charged in the case of *Rex* v. *Berenger* (2). It may be more prudent in future for those who draw indictments like this to put in a more distinct averment of the offence. It never can do harm.

Then it was argued that a specific question ought to have been put to the jury. It seems to me that it was not necessary, otherwise no verdict would stand. You ask the jury "Do you suppose so and so? if yes, you will find the defendant guilty." The jury say "Yes," and the verdict is entered "guilty." If it were a special verdict in the old form you would then allege that the jury found all the particular facts. But here the jury found that the defendants obtained the quotation by fraud, and that necessarily involves the intention, which I think the indictment sufficiently alleges. It would be monstrous to say we ought
746] to grant a new trial or *arrest the judgment and enter the verdict for the defendants because the formal question

(1) 3 M. & S., at p. 15. (2) 3 M. & S. 67.

whether the jury thought that getting a false quotation might affect the prices was not in words put to them. I am clearly of opinion that the second count is sufficient to justify judgment, and that the verdict should not be disturbed.

FIELD, J.: I am also of opinion that our judgment must be for the Crown. After the doubt which my Lord has entertained, and still to some extent entertains, it would be presumptuous for me to say I have a clear opinion, but I have an opinion, and it will be my duty to express it,—that opinion is that the second count is good.

With regard to the first count, which is based on the allegations that these frauds, which were undoubtedly committed, were committed for the purpose of inducing the Stock Exchange to appoint a special settling day, it appears by the recital in the count that in all cases of new companies, before the Stock Exchange will appoint a special settling day, they require certain vouchers to be laid before them as to the position of the new company; among other things they require to know what the amount of capital is, what quantity of the shares have been *bona fide* subscribed for, and what part of and how the capital has been actually paid to the company. They are not satisfied with merely taking a statement of that from the parties seeking to have the special settling day made, but they require that the bankers' books and the other documents connected with the company which shall vouch this state of things shall be laid before them. The result, of course, is not only that they themselves have to be satisfied that the elements of the new company are sound and good, and such as ought fairly to be dealt with on the Stock Exchange, but that the public who go on the Stock Exchange to deal in the shares shall be satisfied that those matters have been investigated by a competent authority. Now, in the first count, the fraud alleged is that by fraudulent means the committee of the Stock Exchange were induced to appoint a settling day, that is, the day upon which all transactions in shares, whether bought or sold, should be settled, and the amounts paid or received. Now, inasmuch as to put a new company on the market anywhere else than on the Stock Exchange *would be a very difficult undertaking, it seems to [747 me that the count contains the elements of a very grave offence, because from what is there alleged the public would naturally suppose that the committee of the Stock Exchange had fixed a settling day, that all the requirements of the Stock Exchange had been complied with, and that

brokers and others might safely enter into bargains. But undoubtedly the count does stop short of these averments, and I do not wish to forge any fetters by which I might be bound on a subsequent occasion, if any case in principle like this should come before me. With regard to the second count, these averments are supplied. The object of the fraud, as stated in the second count, is the obtaining a quotation, so that the Stock Exchange list, which goes to every corner of England by nine or ten in the morning, should contain the name of the company and the quotation of the shares in it. No doubt any person investing money would resort to the Stock Exchange quotation, as a means of knowing where he might safely put his money and get the necessary interest on it. That being so, the count avers that by the 129th rule of the Stock Exchange, the requirements of the 128th rule must be complied with, namely, that all the various statements must be made, so that the Stock Exchange, before they allow the company to be quoted, shall be satisfied that it is that which it is represented to be. Then the second count says this was done for the purpose of injuring and defrauding the members of the Stock Exchange, and it goes on further to say, and thereby to induce persons who should thereafter buy and sell the shares, to believe the company was duly formed and constituted and had complied with the rules of the Stock Exchange, so as to entitle the company to have these shares quoted in the official list. It is argued that that is not sufficient, because it does not go on and say "to induce those persons thereby to buy and sell." The question upon this is whether the count is fairly capable of this meaning. I think it is. It seems to me the fraud would have been absolutely a barren one if it had not been to raise money by the sale of shares. Then if that meaning can be fairly put on the count, was it supported by evidence? My Lord and my learned Brother have pointed out that it was amply supported by the evidence. Therefore I say, 748] *with respect to my Lord's doubt, I feel some difficulty, but in my own mind I have no hesitation in saying our judgment ought to be for the Crown.

Rule discharged.

Solicitors for prosecution: *Abrahams & Roffey.*
Solicitor for Aspinall: *Goldring.*
Solicitors for Knocker: *Wontner & Sons.*
Solicitor for Whyte: *Huxham.*

See 13 Eng. Rep., 440 note; 15 Eng. Rep., 328 note.

CASES

DETERMINED BY THE

COMMON PLEAS DIVISION

OF THE

HIGH COURT OF JUSTICE,

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE COMMON PLEAS DIVISION,

XXXIX VICTORIA.

[1 Common Pleas Division, 533.]

April 27, 1876.

*WEIDNER v. HOGGETT. [533

Principal and Agent—Contract—Consideration.

B., W. & Co., who had contracted with a colliery company for 10,000 tons of coal to be delivered over a period of three months at a spout on the Tyne, "the turn to be mutually agreed upon," proposed to charter a foreign ship for the conveyance of 29 keels to Elsinore, and tendered to the captain a charterparty which stipulated for demurrage in unloading the ship, but made no provision for detention in loading her. The captain declined to sign such a charter, without an assurance that there should be no undue detention of his ship; and thereupon B., W. & Co. obtained from the defendant (who was a clerk employed by several colliery companies to arrange the turns for loading) the following undertaking,—

"I undertake to load the ship Der Versuch, 29 keels, with Bebside coals in ten colliery working days, &c. On account of Bebside Colliery, W. S. Hoggett."

This memorandum (which made no mention of the person contracted with) was communicated by the charterers to the captain of Der Versuch, who thereupon accepted the charter.

The vessel being detained in loading beyond the stipulated ten days, the captain called upon the defendant to pay him £45, for demurrage. The defendant repudiated all liability, but ultimately offered to pay the captain £20. The defendant had no notice of the charter. In an action by the captain to recover £45 for demurrage from the defendant:

Held, that, upon these facts, a jury were warranted in finding that the undertaking to load within ten days was a contract between the captain and the defendant; that there was sufficient consideration for it; and that the contract was with the defendant personally, and not as agent.

THE declaration stated that the defendant, for certain considerations moving to him from the plaintiff, promised and undertook to the plaintiff in the words and figures following: "Sailing ships. Newcastle-on-Tyne, January 17th, 1873. I undertake to load the ship Der Versuch, 29 keels, with Bebside coals in ten colliery working days (Sundays, Saturdays, cavilling days, and colliery holidays not working days) after the said ship is wholly unballasted and ready in Northumberland Dock to receive her entire cargo; strikes of pitmen or workmen, frosts and storms, and delays at spout caused by stormy weather, and any accident stopping the working, loading, or shipping of the said cargo, always excepted: time to count from the day following that on which notice of readiness is received; said notice (in writing) to be handed to Mr. R. Thompson as soon as the ship is actually ready as above stipulated, and not before: The ship 534] to move to the *spout and proceed with her loading whenever required to do so during the entire continuance of her lay days. The non-fulfilment of any of the above-mentioned conditions to render this guarantee null and void": Averment of performance of conditions precedent: Breach, that the defendant did not load the said ship in ten colliery working days within the true intent and meaning of the said writing, &c.

Pleas,—1, a denial of the promise,—2, a denial of the breaches alleged,—3, as a defence upon equitable grounds, that the promise and undertaking was made by the defendant solely as agent for certain persons, owners of a colliery called the Bebside Colliery, and that, before and at the time the defendant signed the writing in the declaration mentioned, it was agreed and understood between the plaintiff and the defendant that the defendant was to make the said promise or undertaking only as such agent, and was not to make himself liable as principal; that he, the defendant, signed the said writing in the declaration mentioned in the following manner, "W. S. Hoggett, on account of Bebside Colliery," the plaintiff and defendant *bona fide* believing at the time that the defendant having so signed the said writing would not be personally liable to be sued on the said promise and undertaking; that he, the defendant, had authority to bind the said owners of the said colliery by signing in the manner aforesaid, and the said owners are bound by the

said writing, and are liable to be sued for any breaches of the undertaking or promise therein contained that may have been committed; and that the plaintiff is inequitably taking advantage of the mistake in drawing the said written instrument contrary to the intention both of the plaintiff and of the defendant. Issue thereon.

The cause was tried before Huddleston, B., at the Durham summer assizes, 1875. The action was brought by the captain of a German ship called Der Versuch to recover damages for detention of the vessel beyond the ten days at £7 per day. The defendant is a clerk of the Bebside Colliery Company, who, in December, 1872, made a verbal contract with Messrs. Bilton, Williams & Co., merchants of Newcastle, to supply them with 10,000 tons of coals, to be delivered over the months of January, February, and March, 1873, the turn to be mutually agreed upon. *In January, 1873, Messrs. Bilton, Williams & Co. chartered the plaintiff's ship for the conveyance of a cargo of coal (part of the quantity contracted for) from a dock in the river Tyne to Elsinore. [535

The charterparty stipulated for demurrage in unloading the ship, but made no provision for any detention in loading. The captain of Der Versuch at first refused to sign a charter in this form; but he at last consented, upon the merchant's engaging to get an undertaking from the colliery owners that the time consumed in loading her should not exceed ten days. The undertaking declared upon was thereupon obtained, and the charter was executed.

When contracts for coals are made, as in this case, extending over a period, inasmuch as the merchant cannot fix the exact time when he may require the coal and when the ship will be at the spout, and as the colliery owners cannot know what may be the state of their turn book when the merchant may require the coals, it is part of the agreement between the colliery owner and the merchant that the turn shall be fixed when the merchant is ready to take the coals. The colliery owner keeps a book called the "Turn Book," in which are entered all vessels which he has engaged to load; and, when the merchant requires his coals, before entering into a charter, he goes to the colliery office and looks at the book to ascertain when they can be loaded. When the turn has been fixed, the charter is concluded, and the merchant gets the undertaking from the colliery owner.

In this case it was a clerk of Bilton, Williams & Co., who went to the colliery office and obtained the undertaking.

The undertaking is a printed form, and is torn from a book, a counterfoil being left. The signature in this case was as follows: "On account of Bebside Colliery. W. S. Hoggett;" the words "Bebside Colliery" being in writing, and the signature placed underneath them. The ship was ready for loading on the 23d of January, but was not fully loaded until the 14th of February. The captain claimed demurrage; the defendant said he never paid such claims, but ultimately offered the captain £20, which he refused to accept.

The defendant, on cross-examination, said that he acted under the orders of one Walton, who was the fitter of the 536] Bebside and *other colleries, but received his salary from the companies; that undertakings in the form in question were sometimes issued with the merchant's name (but only since 1874), and sometimes not; and that, when he gave the memorandum declared on, he did not know that he was giving it with reference to a charterparty already fixed or about to be fixed.

Walton stated that he was fitter for the Bebside Colliery and for other collieries belonging to the same owners, "different holders, different shares, but the same individuals," and that the defendant was a clerk at a salary of £250 per annum, a proportion of which was paid by each colliery according to the coals raised. This witness proved (subject to objection) that the contract for the 10,000 tons of coal was made by him with Bilton, Williams & Co., deliverable in a given number of months into ships to be provided by Bilton, Williams & Co. On cross-examination, he said that the claim in question should have come through the merchants, and that it was not the course of business to make these claims where there had been no special arrangement.

On the part of the defendant it was submitted that there was no evidence of any contract with the plaintiff, and that, if there was, the defendant was not liable as principal.

The learned judge directed a verdict for the plaintiff for £45 (an agreed sum), giving the defendant leave to move to enter a nonsuit if the court should be of opinion that there was no evidence which ought to have been left to the jury on the part of the defendant.

Herschell, Q.C., in the last Michaelmas sittings, obtained an order *nisi* to enter a verdict for the defendant, on the ground that there was no evidence of a contract between the plaintiff and defendant rendering the defendant liable to demurrage, either with or without the evidence of the contract and dealing between the Bebside Colliery Company being

received; or for a new trial, on the ground of improper rejection of evidence of the contract and dealing between Bilton, Williams & Co. and the Bebside Colliery Company, and of the fact that the defendant acted as clerk only to the Bebside Colliery Company in giving the document sued on.

C. Russell, Q.C., and *Crompton*, showed cause: But for the undertaking *given by the defendant on the 17th [537 of January, 1873, the plaintiff would have been without remedy for demurrage: he was therefore perfectly justified in refusing to execute the chartérparty until he got an undertaking that his ship should be loaded within a given number of days. The defendant is not the less liable because he professes to sign the undertaking as agent: see *Tanner* v. *Christian* (1), *Leonard* v. *Robinson* (2), *Parker* v. *Winlow* (3), and the other cases cited in the notes to *Thomson* v. *Davenport* (4) in 2 Sm. L. C., 7th ed., 384 *et seq.* The contract was clearly made for the plaintiff's benefit, and he is entitled to sue upon it. As far as it was a question for the jury, they have decided it in the plaintiff's favor.

Gainsford Bruce, (*Herschell* Q.C., with him), in support of the order: The undertaking was given to Bilton, Williams & Co., or to the charterer; the defendant made no contract with the plaintiff. The existence of a charterparty was not brought home to the defendant.

Lord Coleridge, C.J.: I am of opinion that this order should be discharged. The action is brought upon an undertaking (signed by the defendant) to load the ship Der Versuch with Bebside coals in ten colliery working days; and it is admitted that she was not so loaded, and the ascertained damages for the breach of the undertaking are £45. The defence set up is, that there is no contract between the plaintiff and the defendant. I am, however, of opinion that there was evidence for the jury that the contract declared on was made with the plaintiff. What is the fair meaning of such an undertaking? The case may be put on either of two grounds. The plaintiff, the master of Der Versuch, had declined to accept a charter in the terms in which it was offered to him, and which appears to be a form which is commonly known, unless this undertaking was procured for him by Bilton, Williams & Co. It was procured, and there was abundant evidence that it was procured for him; and, when a claim was made upon the defendant under it he admitted that there was a contract, but disputed *the [538

(1) 4 E. & B., 59; 24 L. J. (Q.B.), 91.
(2) 5 E. & B., 125; 24 L. J. (Q.B.), 275.
(3) 7 E. & B., 942; 27 L. J. (Q.B.), 49.
(4) 9 B. & C., 78.

extent of it, and offered to pay the plaintiff £20. I think that was a sufficient acknowledgment of the contract to render the defendant liable upon it. I cannot, however, help thinking that the verdict is sustainable upon another ground. Although the other party is not named in it, it would seem to me to be a contract by the defendant with any one who may be concerned, and who acts upon it. As to the signature, Mr. Bruce does not deny that it was, according to the authorities, sufficient to bind Hoggett as principal.

BRETT, J.: The only question argued was whether there was evidence that this contract made by the defendant was made with the plaintiff. It was contended that it was a contract with Bilton, Williams & Co., and not with the plaintiff. I must confess I think the case is not free from difficulty; but, upon the whole, I come to the conclusion that there was evidence to justify the jury in finding that the contract was made with the plaintiff. The contract was made with reference to a foreign ship; and, according to a well-known custom where the charterers are acting for a foreign merchant, it was proposed to the captain to insert a clause in the charterparty stipulating for demurrage in unloading the ship, but making no provision for detention in loading her. This the captain refused to assent to without receiving an undertaking which would secure him from undue detention. Accordingly Bilton, Williams & Co., obtain for him the undertaking declared on, to satisfy his claim if the ship should be detained. The charterers, it appeared, had a contract with the colliery owners for a supply of 10,000 tons of coal within three months: and it is said that this undertaking was an agreement between the charterers and the colliery owners, in furtherance of that agreement. So treating it, it would be idle; there would be no consideration for it on either side. It is true that the defendant had no notice of the charter: but he knew from its name that the coal was to be put on board a foreign ship, and he knew that the undertaking was given with reference to a ship which traded from abroad. It is fair, therefore, to say that he knew that the agreement was made on behalf of the captain, and could not have been intended to be made for the
539] charterers, who could incur no demurrage for *delay. The captain, therefore, may be treated as an undisclosed principal. I cannot help thinking there was evidence of a contract between the plaintiff and the defendant. Further, the jury were entitled to take into consideration the admission of the defendant when the claim for detention was made

upon him by the plaintiff. Both upon the original making of the contract, therefore, and upon the admission, I think there was abundant evidence to justify the jury in finding that the contract was made by the defendant with the plaintiff.

LINDLEY, J.: The whole difficulty arises from the use of a printed form beginning "I undertake," and leaving in blank the name of the person intended to be contracted with. We are compelled to look outside the document in order to ascertain to whom or for whom the undertaking could be given. "I undertake to load the ship Der Versuch, 29 keels, with Bebside coals in ten colliery working days," must mean an undertaking either with the owner, the charterers, or the captain of the ship. Looking at all the circumstances of the case, it seems to me that there is abundant evidence to show that the undertaking was signed by Hoggett and given to the charterers for and on behalf of the captain as an undisclosed principal. It is true that Hoggett did not know the plaintiff: but that applies in all cases of contracts made for undisclosed principals. Upon the true construction of the document, I think the plaintiff was the proper person to sue and the defendant the proper person to be sued upon it. The printed form shows the place from which the coals were to come, viz., "Bebside Colliery;" but the defendant who signs it does not profess to be acting as agent for any one. I think there was abundant consideration for the contract after it had been acted on. Upon all the grounds therefore I think the order should be discharged.

Order discharged.

Solicitors for plaintiff: *Oliver & Botterell.*

Solicitors for defendant: *Pattison, Wigg & Co.*, for G. Armstrong, Newcastle.

See 9 Eng. Rep., 15 note; 16 Eng. Rep., 452 note; note to Williams *v.* North China Ins. Co., *post*, p. 310.

A promissory note in the usual form, "we promise to pay," etc., executed by the makers thereof in their individual names, with the addition thereto of "trustees of the," etc., "church of," etc., is the note of said makers personally, and not of said church: Hays *v.* Crutcher, 54 Ind., 260.

Where a person signs a note, adding to his signature "agent," and the note is transferred to a purchaser for value before due, it has been held, that no evidence tending to show that the person to whom the note was originally given accepted the same as the obligation of the principal and in payment of the principal's debt, is competent. The addition of the word "agent" does not vary it either way and is mere surplusage: City Bank *v.* Drake, 5 N. Y. Weekly Dig., 477, Haight, J., circuit.

We doubt the soundness of such decision. It seems to us that according to the current of the authorities it, on its face, was notice that the person

signing did not intend to bind himself personally, and that any person taking the paper was chargeable with notice of such fact and bound, at his peril, to take notice thereof and ascertain who was the principal.

One member of a firm who induces a third person to sign a note made by one member of the firm as maker, under a representation that it is a firm debt, and for the benefit of the firm, and is so made at request of one who is to discount it, is not liable to the member of the firm so inducing him to indorse it as if it were a firm note; such partner would be first liable thereon: Wells *v.* Miller, 66 N. Y., 255, distinguishing Norton *v.* Coons, 6 N. Y., 33.

An indorser of a promissory note is a competent witness to prove an agreement *in writing* made with its holder at the time of his indorsement, that he shall not be held liable thereon, where the paper has not afterwards been put into circulation, but is held by the party to whom such an indorsement is made.

Such an agreement, and the indorsement, taken together, are equivalent, so far as the holder of the note is concerned, to an indorsement without recourse to the indorser: Davis *v.* Brown, 94 U. S. Rep., 423; 16 Eng. Rep., 653 note.

In an action by an indorser of a promissory note, who has paid the same, against a prior indorser, it is competent for defendant to prove by parol that all the indorsers were accommodation indorsers, and by agreement they were, as between themselves, co-sureties. Such agreement would *ipso facto* apply to notes given in renewal thereof by the same parties: Easterly *v.* Barber, 66 N. Y., 433: Charles *v.* Denis, 42 Wisc., 56.

See Eaton *v.* McMahon, 42 Wisc., 484.

But where a note is not protested, as against an indorser, parol evidence is not competent to hold him on the ground that the actual contract between the parties was other than that of indorser and indorsee: Barnard *v.* Gaslin, 23 Minn., 192; Bank *v.* Bank, 20 Minn., 63; Kern *v.* Van Pohl, 7 Minn., 426; Levering *v.* Washington, 3 Minn., 323.

See also Third, etc., *v.* Clark, 23 Minn., 263; Eaton *v.* McMahon, 42 Wisc., 484.

[1 Common Pleas Division, 540.]

June 20, 1876.

540] *SEAMAN v. NETHERCLIFT.

Defamation—Slander—Privilege of Witness.

The defendant, an expert in handwriting, had given evidence in the Court of Probate on the trial of a case called *D.* v. *M.*, in which the genuineness of the signature of the testator to a will was in issue, and had pronounced it as his opinion that the signature was a forgery. The jury found in favor of the will, and the judge of the Court of Probate made some strong observations of an unfavorable nature with regard to the defendant's evidence.

The defendant was afterwards a witness for the defence at a preliminary inquiry before a magistrate into a charge of forgery. The counsel for the prosecution asked him, in cross-examination, whether he had read the remarks made, as above mentioned, by the judge of the Court of Probate, and upon the defendant answering that he had, sat down. The defendant then said he wished to make a statement about the case of *D.* v. *M.* The magistrate said that he could not hear anything about a case not then before the court, and tried to stop him, but the defendant persisted, and said, "I believe that will to be a rank forgery, and shall believe so to the day of my death."

In respect of the words so spoken the plaintiff, who was an attesting witness to the will, brought an action of slander:

Held, that the statement was privileged, and the action would not lie, although the jury found that the words were not spoken by the defendant in good faith as a wit-

ness, that he spoke them as a volunteer and for his own purposes, and that he spoke them maliciously, and the court were of opinion that there was evidence to justify these findings.

ACTION of slander. Plea, not guilty.

The nature of the slander and the facts sufficiently appear from the judgment. The judgment was entered for the plaintiff for £50, the damages found by the jury, leave being reserved to move to enter it for the defendant.

May 19. *McIntyre*, Q.C., *R. V. Williams*, and *Hollings*, moved for judgment for the defendant accordingly: The statement made by the defendant was privileged. It was material because it went to his credit. It would have been competent to counsel to re-examine the witness to set up his credit, and if on such re-examination he had said the same thing it would not have been actionable. It can make no difference that he volunteered to set up his own credit by stating that he continued to hold the same opinion in reference to the case alluded to. The words were spoken by him as a witness in a judicial proceeding and in the course of giving his evidence with relation to the subject-matter of the proceeding.

*The findings of the jury must be disregarded, [541 for there was no evidence to support them. It would be in the highest degree dangerous to diminish the safeguard afforded to witnesses by making it a question for the jury in every case whether the witness spoke *bona fide* in the exercise of his functions as a witness.

[They cited *Dawkins* v. *Lord Rokeby* (1); *Henderson* v. *Broomhead* (2); *Revis* v. *Smith* (3); *Scott* v. *Stansfield* (4); *Astley* v. *Younge* (5); *Rex* v. *Skinner* (6).]

Montagu Chambers, Q.C., and *Bowen May*, showed cause: The question is whether the defendant was acting as a witness when he made these observations. His examination was at an end. The presiding magistrate had ruled that it was so, and in defiance of that ruling and, as the jury find, *mala fide*, he persists in making the statement. There must be some limitation to the witness's privilege. The statement to be privileged must be made in relation to the matter in hand. It is submitted that when the witness, after his examination is closed, in defiance of the ruling of the presiding judicial authority as to what is connected with the matter in hand, voluntarily persists in making a statement of such a kind as this, there is evidence that he

(1) Law Rep., 7 H. L., 744.
(2) 4 H. & N., 569.
(3) 18 C. B., 126; 25 L. J. (C.P.), 195.
(4) Law Rep., 3 Ex., 220.
(5) 2 Bur., 807.
(6) Lofft., 55.

was not acting as a witness, and consequently was not privileged.

[They cited Bacon's Abridgment, title Slander E.; *Buckley* v. *Wood* (1); *Hodgson* v. *Scarlett* (2); *Trotman* v. *Dunn* (3).]

R. V. Williams, in reply, cited *Barber* v. *Lissiter* (4); *Lake* v. *King* (5); *Kennedy* v. *Hilliard* (6); *Gwinne* v. *Poole* (7).

Cur. adv. vult.

June 30. The judgment of the Court (Lord Coleridge, C.J., and Brett, J.) was delivered by

LORD COLERIDGE, C.J.: This was an action tried before me at Westminster during the last Hilary Sittings; and, as 542] the facts *were somewhat peculiar, and our judgment must as it seems to me depend upon the view which is taken of them, it is necessary to state them.

The action was for defamation. The defendant did not deny uttering the words complained of: but he contended that, under the circumstances, the action would not lie. The circumstances were these: The plaintiff is an attorney who had, together with a Mr. Parsons, attested a will which had been the subject of a suit intituled *Davies* v. *May*, before Sir James Hannen and a special jury in December, 1875. The defendant is an expert in handwriting; and he had given evidence in the suit of *Davies* v. *May*, to impeach the genuineness of the testator's signature to the will which was in dispute in that suit. The jury stopped the case, and found in favor of the will, adding that they thought the imputation made upon the genuineness of the testator's signature entirely groundless. Sir James Hannen stated that he concurred in that opinion; and added some strong observations of his own as to what he thought the recklessness and presumption of the defendant in persisting in declaring that, in his opinion, the signature was forged, in the face of what he the judge and the jury considered to be overwhelming evidence in point of fact that it was genuine. These remarks were published with substantial accuracy in the Times newspaper of the next day.

Shortly afterwards, on the 17th of December, 1875, a charge of forgery was preferred against a person named Morphett, before Sir James Lawrence, the sitting alderman at the Guildhall in London; and the defendant was called

(1) 4 Co. Rep., 146.
(2) 1 B. & A., 232.
(3) 4 Camp., 211.
(4) 7 C. B. (N.S.), 175; 29 L, J. (C.P.), 161.
(5) 1 Saund., 130.
(6) 10 Ir. Com. Law (N.S.), 195.
(7) 2 Lutw., 1571.

as a witness on that inquiry for the purpose of establishing the genuineness of the alleged forgeries.

I state what follows from my own notes of the evidence given on the trial of this action by the witnesses who were present at the Guildhall, and whose evidence was not in any manner impeached or qualified by the defendant.

After he had given his evidence in chief, he was cross-examined by the counsel for the prosecution. He was asked whether he had been engaged as a witness in the case of *Davies* v. *May*. He said he had been. He was then asked whether he had read what Sir James Hannen had said as to his evidence in that case. He *said he had. The [543 cross-examining counsel then stopped, and sat down. The defendant then went on to say that he wished to make a statement as to the case of *Davies* v. *May*. Sir James Lawrence said that he could not hear any statement respecting a case which was not before the court. The defendant then said, after Sir James Lawrence had in vain tried to stop him,—"I believe that will to be a rank forgery, and I shall believe so to the day of my death." These were the words for which the action was brought.

I left the case to the jury, and asked them to answer three questions in writing,—1. Were the words spoken by the defendant in good faith as a witness, or in answer to any question put to him as a witness? 2. Did he speak them otherwise than as a witness, as a volunteer, and for his own purposes? 3. Were they spoken maliciously? The jury answered the first question in the negative, and the second and third in the affirmative; and they found a verdict for the plaintiff for £50 damages.

Very interesting questions are, no doubt, touched by the circumstances of this case, and were discussed upon the argument before us. But the real question, which perhaps cannot be determined without discussing some of them, is this,—Was there evidence to go to the jury in support of the plaintiff's case? If there was, I am of opinion, from all that passed at the trial, that the verdict was perfectly correct. But it may be that the undisputed facts of the case raised no question for the jury, and that I was bound upon those facts to withdraw the case from them, and to hold that a statement made under such circumstances was absolutely and unconditionally privileged, whatever its character, and that no action lay for it. Whether I ought so to have held is really the question to be decided.

The privilege of the various persons engaged in the trial of a suit or action in a court of law, of the judge, of the

jury, of the parties, of the counsel, of the witnesses, is under certain circumstances absolute. But the circumstances which give this absolute privilege are not exactly the same in the case of all the different persons whom I have enumerated. It is not, however, now necessary to discuss the differences which affect the respective privileges. In one matter it should seem that all the parties to a judicial
544] *proceeding stand as to privilege upon the same foot. The words spoken, in order to be privileged, must, to use the words of Lord Mansfield in *Rex* v. *Skinner* (1) be "words spoken in office." "Neither party, witness, counsel, jury, or judge," says he, "can be put to answer civilly or criminally for words *spoken in office*." That was a case of indictment against a borough justice; and Lord Mansfield observes that, "to go on an indictment" (and the observation is equally applicable to an action), "would be subversive of all idea of a constitution." It is true that Lord Wynford, in *Allardine* v. *Boswell* (2), Lord Denman, in *Rendillon* v. *Maltby* (3), and the present Lord Chief Justice of England, in *Thomas* v. *Churton* (4), have expressed opinions implying that the words of Lord Mansfield above given are too general, and that they were disposed to hold a judge liable for words spoken even in office, if spoken in abuse of office, with express malice, and without reasonable cause. Individually, I think there is a great deal to be said for that view. But a series of authorities from the time of Lord Coke, and even before his time,—most of which will be found collected in *Scott* v. *Stansfield* (5),—seem to me to have held the contrary; and these authorities bind me here. The authority of *Scott* v. *Stansfield* (5), however, and of every case so far as I am aware to be found in the books, applies only to words spoken by a judge in his judicial character, and in the exercise of his functions as judge.

It follows that the words in this action, if they had been spoken by the presiding magistrate, not in his judicial character, and not in the exercise of his judicial function, would have formed the ground of an action against him.

The question in the present action could never have arisen till quite of late years in the case of actual parties to proceedings; because they could speak only by pleading or by affidavit, or when they were conducting their case in person either in a civil or a criminal court. Now, a long course of authorities, of which perhaps the best known, as the most remarkable, is the case of *Astley* v. *Younge* (6), has decided

(1) Lofft., 55.
(2) 1 Dow. & Cl., 495.
(3) 1 Car. & M., 409,
(4) 2 B. & S., 475.
(5) Law Rep., 3 Ex., 220.
(6) 2 Burr., 807.

that no action of slander can be brought for any statement made by the parties either in the *pleadings or dur- [545
ing the conduct of the case. The law is so stated very clearly by Lord Eldon in *Johnson* v. *Evans* (1): it is so stated also, not indeed with absolute certainty, in a note to the well known case of *Hodgson* v. *Scarlett* (2), the author of which note, we learn from Baron Alderson in *Gibbs* v. *Pike* (3) to have been Mr. Justice Holroyd himself. But I conceive the law on this point to be now quite certain, although most men of any experience in the profession must have seen many instances in which judicial proceedings have been made by parties to them to serve the ends of private malignity. It is equally certain, however, nor has any question ever been raised, that the privilege of parties is confined to what they do or say in the conduct of the case.

It is not necessary to discuss the case of counsel; but it may be observed that their privilege is at least not greater than that of parties, and that it may be less; for, it has never yet been decided that they would not be subject to an action for words spoken even during the conduct of a case, if the words were irrelevant, *mala fide*, and spoken with express malice; all which qualities in the words, it is to be observed, are and must be questions of proof, and for the jury (4).

The question arising on statements in affidavits is not precisely the question here, whether the statements are made by parties or by witnesses; for, it is almost impossible to imagine a statement in an affidavit to be other than a statement made in the course of a judicial proceeding; and though false and malicious statements, if so made, may be criminally punishable, they are absolutely privileged as regards civil actions.

It is impossible to have cases stronger in their circumstances than *Bevis* v. *Smith* (5) and *Henderson* v. *Broomhead* (6). In the latter case, which is a decision of the Exchequer Chamber and binding upon us, scandalous, false, and malicious statements upon a person not a party to the cause, in an affidavit made in the course of the cause, were held no ground of action: and Crompton, J., laid it down that "no action will lie for words spoken or written in the *course of any judicial proceeding:" and, again: [546
"The rule is inflexible, that no action will lie for words spoken or written in the course of giving evidence." In a

(1) 3 Esp., 32.
(2) 1 B. & A., 245.
(3) 9 M. & W., 358.
(4) See per Holroyd, J., in *Hodgson* v. *Scarlett*, 1 B. & A., at p. 247.
(5) 18 C. B., 126.
(6) 4 H. & N., 569.

case identical with this, *Kennedy* v. *Hilliard* (1), the late Lord Chief Baron of the Exchequer in Ireland reviews with great elaboration the whole series of authorities, and in a most instructive judgment arrives at the same conclusion.

These cases and the case of *Dawkins* v. *Lord Rokeby* (2) seem to establish that, as regards a witness, his privilege for words spoken in giving evidence is absolute and unqualified. "They are not responsible," says Mr. Starkie (3), "in a civil action for any reflections thrown out in delivering their testimony." They have been protected in cases where there was far less excuse, morally speaking, for their slanders than existed for the defendant in the case before us; and though I confess I do not agree with much of the reasoning upon which the absolute and unqualified rule is founded, yet the rule exists, and it is not for me to question it.

Were, then, the words in this case spoken in giving evidence,—in the course of a judicial proceeding? In some cases this must be a question for the jury. In *Trotman* v. *Dunn* (4), Lord Ellenborough left to the jury the character in which the defendant spoke the words; the report stating that the words were spoken while the plaintiff and defendant were attending before the court of conscience; but that it did not appear distinctly in what stage of the proceedings they were spoken, or to whom they were addressed. Instances may be put in which, even where the facts are clear, it would yet be difficult to say in point of law whether the judicial proceeding was or was not going on, and whether the words were or were not spoken in giving evidence. But, if a rule is established as the rule as to the privilege of a witness *is* established, it is the duty of a judge to give it a reasonable interpretation, and not, while admitting it in terms, to attempt to evade it or fritter it away in its application to particular cases. In this case, I think it clear, upon consideration, that the judicial proceeding was going on, and that the words declared upon were part of the defendant's evidence. The cross-examining counsel could not
547] by stopping, as *he did, take away the right of the defendant to complete his answer, nor abridge his legal privilege of immunity for the words of the answer when so completed. The defendant had a right to add to the statement that he had read the remarks of Sir James Hannen the further statement that in spite of those remarks he remained

(1) 10 Ir. C. L. Rep. (N.S.), 195.
(2) Law Rep., 7 H. L., 744.
(3) 1 Stark. on Libel, 242.
(4) 4 Camp., 211.

and always should remain of opinion that the will in question was a forgery. The question of counsel was ingeniously suggestive; and the defendant had a right, if he could, to meet the suggestion it conveyed. If relevancy in the words be material for the protection of a witness, I think the words were relevant; for, the defendant's character had been in effect challenged by the counsel, and the defendant had a right to say what he thought would vindicate it. But, whether relevancy be material or not, it seems to me that the main point is clear; and that we could not hold that the defendant's evidence was over, and the judicial proceeding at an end, under these circumstances, without evading or frittering away an established rule of law. I am therefore of opinion that I ought to have withdrawn the case from the jury, and that the judgment should be for the defendant.

I concur entirely in the observations made by Sir James Hannen and the jury before him as to the recklessness and presumption of the defendant: and he persisted in the action before me, in a charge of the most offensive nature, upon no better ground, as he admitted, than his own confidence in his own skill. I do not at all wonder that the jury found as they did; and, if the matter were for them at all, I should have agreed with them entirely. But it was not for them; and the plaintiff must derive such satisfaction as he can from the opinion of two judges and two juries that there was no ground whatever for the charge against his character made and persisted in by the defendant.

My Brother Brett concurs in this judgment, except as to the doubts which I have expressed as to the reasoning of the judges in some of the earlier cases.

Judgment for the defendant.

Solicitor for plaintiff: *Seaman.*
Solicitors for defendant: *Marsden & Son.*

The defendant, in an action for libel and slander, claimed that the words were privileged, having been used by him in the course of his testimony as a witness in a regular judicial proceeding. On the trial, the judge instructed the jury that, if they found the defendant believed his answers were pertinent and relevant to the question at issue when the words were uttered, their verdict should be for the defendant; if, on the other hand, they found that the defendant was actuated by malice, or knew that the words were not relevant, and availed himself of the opportunity to defame the plaintiff, the position of witness did not protect him; and submitted the question to the jury: Held, a correct instruction, and that whether the defendant was protected, under the circumstances, is not a question of law, but was properly submitted to the jury: White *v.* Carroll, 42 N. Y., 161.

See Perkins *v.* Mitchell, 31 Barb., 461; Powell *v.* Kane, 5 Paige, 265.

A petit juror, while acting in the discharge of his duty as a part of the

court, is exempt from responsibility by civil action for what he says in the jury room concerning the cause. The rule of absolute privilege and protection, established as to members of legislative bodies, applies to jurors: Dunham *v.* Powers, 42 Vermn., 1, 8–9.

As to slander by a clergyman, etc., during a church trial, church discipline, to members of the church, etc., see Klyser *v.* Symmes, 40 Ind., 562; Coombs *v.* Rose, 8 Blackf., 155; Lawyer *v.* Hopkins, 22 Maine, 268; Shelton *v.* Nance, 7 B. Monr. (Ky.), 128; Dial *v.* Holter, 6 Ohio St. R., 228.

By a Roman Catholic priest, in publishing plaintiff's suspension, etc., from the church: 13 Eng. Rep., 382 note; O'Keefe *v.* Cullen, Irish L. R., 7 C. L., 319; Servatus *v.* Pichel, 34 Wisc., 292; Fitz Gerald *v.* Robinson, 112 Mass., 371; Farnsworth *v.* Storrs, 5 Cush., 412.

For slander of one in a sermon, etc.: Debonin *v.* Archambult, 19 Lower Can. Jur., 156; Brossoit *v.* Turcotte, 20 Lower Can. Jur., 141; Blanchard *v.* Richer, Id., 146; 3 Cent. Law Jour., 637.

Complaint to lodge of "Odd Fellows:" Streety *v.* Wood, 15 Barb., 105.

Trial before a medical society: Burrows *v.* Bell, 7 Gray, 301.

[1 Common Pleas Division 548.]

May 5, 1876.

548] *Charles and Another v. Blackwell and Another.

Principal and Agent—Agent's Authority to receive Checks—Absence of Authority to indorse—16 & 17 Vict. c. 59, s. 19—Indorsement "per Procuration" or "as Agent."

An indorsement of a check "per procuration" or "as agent," purports to be an indorsement by the payee within 16 & 17 Vict. c. 59, s, 19, so as to protect the banker who has paid it, though the person by whom such indorsement is actually made has no authority to indorse.

K., an agent of the plaintiffs, having authority to sell goods for them and to receive payment in cash or by check, but having no authority to indorse checks, received from the defendants a check on their bankers drawn payable to "S. & Co. (the name of the plaintiffs' firm) or order," and fraudulently indorsed it "S. & Co., per S. K., agent," and misappropriated the proceeds. The bankers having paid the check and returned it to the defendants and charged the amount to their account:

Held, that such payment by the bankers was a payment within the protection of the statute, and that the plaintiffs could not sue the defendants either for the price of the goods or for an alleged conversion of the check.

Action for the conversion of a check with a count upon the check, and a count for goods sold, &c.

Pleas, amongst others, not guilty.

The cause was tried before Lord Coleridge, C.J., at the London Michaelmas sittings, 1875. The facts were as fol lows: The plaintiffs carried on business in Milk Street, London, under the name of Charles & Co. They also started a separate business in Jewin Street under the name of Smith & Co., in the conduct of which one Samuel Kingsford acted as their agent. In November, 1874, the defendants bought goods of the plaintiffs through their agent Kingsford, receiving from him invoices headed "Bought of Smith & Co., merchants, London," with the following words in the margin, "Agent, S. Kingsford, Jewin Street."

These invoices were made out by the plaintiffs and forwarded to the defendants by Kingsford. In due course the plaintiffs applied to the defendants for payment for the goods, when they found that Kingsford had obtained from the defendants two checks, for £350 and £150 respectively, drawn by the defendants upon the London and County Bank payable to "Smith & Co. or order." Kingsford never accounted to the plaintiffs for these checks, but obtained payment of the money from the bank by indorsing them "Smith *& Co., per S. Kingsford, agent," and con- [549 sequently the checks got back into the hands of the defendants, the drawers. The plaintiffs in reality only sought to recover a sum of £262, the extent of Kingsford's defalcation in respect of this transaction. It was admitted that Kingsford had authority to receive payment for goods on account of the plaintiffs in cash or by check, but that he had no authority to indorse checks.

Upon these facts, his Lordship directed a nonsuit.

Herschell, Q.C., obtained an order *nisi* for a new trial, on the ground of misdirection.

May 5. *Murphy*, Q.C., and *Channell* showed cause: The first question is whether the indorsement of this check was an indorsement within s. 19 of 16 & 17 Vict. c. 59, so as to justify the bank in paying the amount to Kingsford. The section is as follows: "Provided always that any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall when presented for payment purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such indorsement or any subsequent indorsement was made by or under the direction or authority of the person to whom the said draft or order was or is made payable either by the drawer or any indorser thereof." The banker is supposed to know his customer's signature, but he cannot know that of the indorser. Kingsford was the general agent of the plaintiffs: he was authorized to sell goods for them and to receive payment for them in money or by check. If this check had been indorsed simply "Smith & Co.," no question could have arisen: the bank would have been justified in paying it. But it will be said that an indorsement "per procuration" (which the indorsement here amounts to) is not within the statute, inasmuch as it does not purport to be an indorsement "by the person to whom the check is drawn payable." There is no decided

case in banc upon the subject: but there is an unreported *nisi prius* case of *Cooper* v. *Bank of England*, cited in 550] *Hare* v. **Copland* (1), where Martin, B., ruled that an indorsement in this form, "Jackson & Co., per proc., J. Holmes, Agent," was a sufficient indorsement within the statute to warrant the bank in paying a check drawn payable to "Jackson & Co. or order," though it was admitted at the trial that Holmes had no authority to indorse checks for Jackson & Co., his employers; and that ruling was not questioned (2). The defendants here have ratified the act of their bankers in paying the draft; therefore, as between them and the plaintiffs, the goods have been paid for to an agent authorized by the latter to receive the money. A payment upon an indorsement in this form is quite as much within the mischief which the statute intended to meet as a signature without the words "per procuration" or "agent." Assuming that to be so, the defendants' money has reached the hands of an agent authorized to receive it for the plaintiffs, and they cannot now have recourse to the defendants either for the check or for the price of the goods.

Herschell, Q.C., and *Lumley Smith*, in support of the order: Consider the case apart from Kingsford's authority. The check was drawn payable to "Smith & Co. or order," a mode of drawing adopted for the purpose of insuring the proceeds reaching the hands of the payees. Before 16 & 17 Vict. c. 59, if the indorsement was forged, and the bankers paid the check upon that forged indorsement, they could not have charged their customers with the payment. Now, there can be no ratification of a forged indorsement, or of a payment made upon a forged indorsement: *Brook* v. *Hook* (3).. As against the plaintiffs, therefore, the payment was not a good payment, consequently the check remains their property, and they are entitled to recover it from the defendants into whose hands it has improperly passed, in order that they may present it at the bank with a proper indorsement. The enactment in 16 & 17 Vict. c. 59 makes no difference. The check does not "purport to be indorsed by the person in whose favor it is drawn." An indorse-551] ment "per procuration" is not an indorsement *by the person to whom the instrument is drawn payable: and this is not even an indorsement per procuration; it is in a singular and unusual form. The acceptance or indorse-

(1) 18 Ir. C. L. Rep., 426, 450.

(2) Mr. Justice Christian, at p. 439, referring to the source from which the information as to that case was obtained, viz., a shorthand writer's note of it furnished by the solicitors of the Bank of England, says,—"Really, after having stooped so low for an authority, we are but ill rewarded for our humility."

(3) Law Rep., 6 Ex., 89.

ment of a bill of exchange expressed to be "per procuration" is a notice to the indorsee that the party so accepting or indorsing professes to act under an authority from some principal, and imposes upon the indorsee the duty of ascertaining that the party so accepting or indorsing is acting within the terms of such authority: 1 Parsons on Bills, pp. 119, 120, citing *Attwood* v. *Munnings* (1) and *Alexander* v. *Mackenzie* (2). The same rule applies to the indorsement of checks. But little reliance can be placed upon the case supposed to have been decided by Martin, B., at the sittings and Guildhall in Hilary Term, 1860; and it was evidently received with very little favor by one eminent member of the Irish bench in *Hare* v. *Copland* (3). Kingsford here is just in the same position that the plaintiffs' traveller Montgomery was in *Hogarth* v. *Wherley* (4). There, M., the plaintiffs' traveller, having received an order for goods from the defendant, a customer, the plaintiffs wrote to M. expressing their unwillingness to execute the order until a former account was settled, adding, "We should like to draw upon him (the customer) for the former," mentioning the amount. M. showed this letter to the defendant, and obtained from him an acceptance at three months' date payable to "my order," with a blank for a drawer's name. This bill was paid at maturity, but not to the plaintiffs, M. having filled up the blank with his own name, and fraudulently negotiated the bill. In an action to recover the price of the goods for which the bill had been given, it was proved that upon one occasion at least the defendant had accepted a bill drawn by M. in blank, which had been received by the plaintiffs as payment; but there was no evidence to show the form of that bill. It was held (Grove, J., doubting) that neither the letter nor the former dealing was any evidence of authority in M. to draw the bill in question, so as to sustain a plea of payment.

BRETT, J.: I am of opinion that this order should be discharged. The plaintiffs were creditors of the defendants upon orders given *to Kingsford, the agent of the [552 plaintiffs. As between the plaintiffs and the defendants, I think it must be taken that Kingsford had authority in the first place to receive in payment a check drawn pay able to the order of the plaintiffs. But, as between the plaintiffs and the defendants, Kingsford had no authority to indorse the check. He did, however, indorse it without the authority or knowledge of the plaintiffs, and in

(1) 7 B. & C., 278.
(2) 6 C. B., 766.
(3) 13 Ir. C. L. Rep., 426, 439.
(4) Law Rep., 10 C. P., 630.

this form,—"Smith & Co., per S. Kingsford, agent;" and the defendants' bankers paid the check as if the indorsement had been a genuine indorsement by Smith & Co., and charged the defendants with the payment. Kingsford, having negotiated the check in this way, may be assumed to have misappropriated the money, or part of it: and the plaintiffs now sue the defendants, first, in trover for the check which had thus got back to the defendants' hands; and, secondly, for goods sold and delivered and for money had and received. The answer on the part of the defendants is, that they are entitled to the check, and that they have paid for the goods. It was argued on the part of the plaintiffs that this case must be decided upon the footing that the indorsement was not within s. 19 of 16 & 17 Vict. c. 59, and as if that act had never been passed; and that, although the defendants did give the check to Kingsford, and Kingsford had authority to receive it, yet, inasmuch as he had no authority to indorse for Smith & Co., the indorsement was a fraud upon his employers, and therefore the bankers, who were only authorized to pay the check upon the indorsement of Smith & Co., have paid it in an unauthorized manner, and consequently the defendants have a right to say to them, "We authorized you to pay a check indorsed by Smith & Co.; you have paid it without such an indorsement, and therefore you have not paid money of ours:" and, the defendants having that right, it is urged that the plaintiffs have an equal right to say to them, "You have not paid us for the goods we sold you." It was further argued that, as the check had been held by Kingsford for the plaintiffs, it remained constructively in their possession, the property in the check was in them, and the unauthorized indorsement by Kingsford did not take that property out of them: and consequently that, the check having come to the hands of the defendants, the plaintiffs have a right to demand it from them, in
553] *order that they may enforce their claim by presenting it at the bank.

On the other hand, it is urged for the defendants that, if the payment by check was a good payment, whether the case was within the statute or not, the money was paid on the check, and the check belongs to them; and that, if the plaintiffs cannot sue them for the money, so neither can they sue them for the check. Further, it was argued that the case was within the statute, and that the defendants could not claim the money from their bankers, because they are protected; and that, if the bankers are protected, the

defendants must be protected also, and consequently the action was not maintainable.

Now, irrespectively of the statute, I should have been inclined to think that the plaintiffs could not sue the defendants for the money; and on this ground. By virtue of the admission made by the plaintiffs at the trial, the defendants were justified in paying Kingsford by check. Kingsford, therefore, having authority to receive a check in the form here given, the moment Kingsford received it it became the property of the plaintiffs; but Kingsford's indorsement was an unauthorized and fraudulent act, and before the statute the bankers clearly would not have been justified in paying the check, and the defendants would have been justified in refusing to allow the bankers to charge the payment to their account. It is not necessary, however, to decide this, because I think the defendants might have adopted the payment of the check by their bankers, and allowed them to charge it to their account: and, if they did so, the money having been received through the act of the agent of the plaintiffs, who had authority to receive payment for them, the plaintiffs could not insist upon the defendants entering into a dispute with their bankers upon the subject. Therefore, as between the plaintiffs and the defendants, the payment would be a good payment. But Mr. Herschell says that the property in the check did not pass from the plaintiffs by the unauthorized indorsement. At present, I do not see the answer to that argument, and am inclined to think that the plaintiffs might have recovered back the check. But they could not sue upon it, provided the bank was justified under the statute in paying it; and, Kingsford being authorized to receive payment by check, as between the plaintiffs and defendants, the payment must be held good; *and, if the check has been properly paid, the plain- [554
tiffs canot maintain trover.

That drives us to consider the construction of the statute. There is some color for the argument that an indorsement by procuration is not an indorsement by the person to whose order the check is made payable, and therefore not an indorsement within the statute. But, upon the whole, I incline to think that that would be putting too narrow a construction upon the statute. I assume that the indorsement here is exactly like an indorsement per procuration; and that the addition of "agent" does not alter its character. A signature "per procuration" is a signature by a person who is authorized to sign as agent for another. The question then is, whether an indorsement by procuration is

within s. 19 of the statute; and that depends on whether the indorsement by procuration purports to be the indorsement of the principal. Construing the first part of the section by the second part, I am of opinion that the protection is extended to the banker, not only where the indorsement purports to be made by the payee, but also where it purports to be made by the authorized agent of the payee. Inasmuch, therefore, as the bankers were protected in paying the check in question, and the check, as between the plaintiffs and the defendants, was a good payment to the plaintiffs through an agent authorized to receive payment in that way, I think the plaintiffs must suffer by their agent's fraud, and that the nonsuit was right.

LINDLEY, J.: I am of the same opinion. This case raises two points, one of substance, the other a technical one. The plaintiffs carried on business under the name of Smith & Co., in Jewin Street, by an agent named Kingsford, who had a general authority to sell goods for them and receive payment, which authority, it was admitted, extended to receiving payment by checks,—a more extensive authority than seems to have been given to the traveller in *Hogarth* v. *Wherley* (1). Having received the check as a payment on behalf of Smith & Co., Kingsford exchanges it for money, and so gets money in payment for goods sold by Smith & Co., the plaintiffs, to the defendants. The plaintiffs now 555] *seek to recover again the money which the defendants have thus already paid. It is said that the claim is sustainable on two grounds, first, that the goods have not in fact been paid for, secondly, that, regard being had to the form of the check, as between the plaintiffs and the defendants the check has not been paid. It seems to me, however, that the goods have in substance been paid for; Kingsford having got the money through the medium of a check. Then, as to the more technical point. Let us look at this as an action for or on the check. It is said that, as the check was indorsed by Kingsford without authority, the payment of the money on that which was equivalent to a forged indorsement will not discharge the defendants. Now, I am not prepared to say that, though Kingsford was the general agent of the plaintiffs, and had authority to receive payment for goods by checks, he would be authorized to indorse them. I incline to think he would not. The question then remains whether the action can be maintained having regard to s. 19 of 16 & 17 Vict. c. 59. It is said that the statute does not apply, because the check does not purport to be

(1) Law Rep., 10 C. P., 630.

indorsed by Smith & Co., the payees. I am not, however, satisfied that the language of the section was not intended to cover indorsements by procuration. I see no reason for holding that it was not intended to protect the banker in the one case as well as in the other. I incline to adopt the view said to have been taken by Baron Martin in *Cookson* v. *Bank of England*, notwithstanding the strictures of Mr. Justice Christian upon that case in *Hare* v. *Copland* (1). If that be the true construction of the act, the check in question has been paid by the bankers upon whom it was drawn; and, if so, it has been paid by the defendants. If, therefore, the action had been upon the check, payment would have been an answer: and it is equally an answer to a claim in trover for the check; for, if paid, the plaintiffs cannot be entitled to recover the check.

LORD COLERIDGE, C.J.: I am of the same opinion.

Order discharged.

Solicitor for plaintiffs: *C. Sawbridge.*
Solicitors for defendants: *Allen & Son.*

(1) 18 Ir. C., L. Rep., 426, 439.

[1 Common Pleas Division, 556.]

May 3, 1876.

*ROURKE V. THE WHITE MOSS COLLIERY COMPANY. [556

Master and Servant—Liability of Employer for Negligence of a Fellow workman—Common Employment—Practice—Costs of Appeal.

The defendants, who were colliery owners, commenced sinking a shaft, for which purpose they employed workmen (amongst whom was the plaintiff) and a steam engine with a man to drive it. Having proceeded some depth, the defendants contracted with one W. to complete the work. Under this contract W. was to employ and pay the workmen (including the plaintiff), and the defendants were to provide steam power and to pay the engineer's wages; the engineer, however, to be under the orders and control of W.

Through the negligence of the engineer, the plaintiff sustained an injury whilst at work at the bottom of the shaft:

Held, that, inasmuch as the plaintiff and the engineer were engaged in one common employment under the orders and control of W., the contractor, the defendants were not responsible for the engineer's negligence, notwithstanding that his wages were paid by them.

The Court of Appeal refused to require an insolvent appellant to give security for the costs of the appeal, where the question at issue had not been previously considered in a court of error.

ACTION against the defendants for alleged negligence in the sinking of a shaft at Skelmersdale, whereby the plaintiff, a workman, was injured.

The cause was tried before Lush, J., at the last winter assize at Liverpool. The facts were as follows: The defen-

dants, who were the proprietors of a colliery, had commenced sinking a pit or shaft, for which purpose they employed workmen, amongst whom was the plaintiff, and a steam engine with a man to drive it. Having proceeded some depth they employed one Whittle, under a verbal contract, to carry on the work for them; Whittle was to employ and pay the workmen, including the plaintiff, and the defendants to place steam power at his disposal in order to facilitate the work. The steam engine and the engineer (one Lawrence) were to be under the control of the contractor Whittle, but the engineer's wages were to be paid by the defendants. The plaintiff was injured through Lawrence, the engineer, falling asleep at his post.

It was contended for the defendants, upon the authority of *Wiggett* v. *Fox* (1) and *Murray* v. *Currie* (2), that they were not responsible for the negligence of the engineer, he 557] being under the *control of Whittle the contractor, and in no way under their control; and that, the injury being the result of the negligence of a fellow workman, the plaintiff was without remedy against the common employer.

A verdict was found for the plaintiff, with £300 damages; leave being reserved to the defendants to move to enter judgment for them if the court should be of opinion that they were not under the circumstances responsible for the negligence of Lawrence. Pursuant to notice,

May 3. *Herschell*, Q.C., and *M'Connell*, moved to enter judgment for the defendants: *Wiggett* v. *Fox* (1) and *Murray* v. *Currie* (2) show that the defendants are not responsible for the injury done to the plaintiff. The person whose negligence caused it was in no sense their servant. The duty which he performed, though performed at their expense, was done under the orders and control of the contractor: consequently, the injury sustained by the plaintiff was the result of the negligence of a fellow servant or workman, for which the plaintiff has no remedy. "When a man enters into the service of a master, he tacitly agrees to take upon himself to bear all ordinary risks which are incident to his employment, and amongst others the possibility of injury happening to him from the negligent acts of his fellow servants or workmen," per Archibald, J., in *Lovell* v. *Howell* (3).

[LORD COLERIDGE, C.J.: The question is whether the present case falls within *Wiggett* v. *Fox* (1) or *Abraham* v. *Reynolds* (4).]

The person guilty of the negligence in *Abraham* v. *Rey-*

(1) 11 Ex., 832.
(2) Law Rep., 6 C. P., 24.
(3) Ante, p. 167.
(4) 5 H. & N., 143.

nolds (') was under no duty or obligation to obey the defendants' orders.

L. Temple, Q.C., and *Gully*, showed cause: The plaintiff and the driver of the engine were not engaged in a common employment: the defendants had no control over the plaintiff; they had over their engine driver, and might dismiss him. *Warburton* v. *Great Western Ry. Co.* (²) is directly in point. There, the plaintiff was a porter in the employment of the London and North Western *Rail- [558
way Company at their Manchester station. The defendants also used that station, and their servants whilst within the station were subject to the rules of the London and North Western Railway Company, and to the control of their station master. The plaintiff, whilst engaged in his usual employment in the station, was injured by the negligence of the defendant's engine driver, in shunting a train without signal. And it was held that the plaintiff and the defendants' engine driver were not fellow servants, and consequently that the defendants were liable. *Abraham* v. *Reynolds* (') was cited there; and *Wiggett* v. *Fox* (³) was fully discussed and distinguished by the court.

[LORD COLERIDGE, C.J.: Lawrence, the engine driver, was under the control of Whittle. Was not his negligence one of the risks which Whittle's other servants took upon themselves?]

It will be extremely dangerous to apply the doctrine in *Wiggett* v. *Fox* (³) to a case the facts of which are essentially different.

Herschell, Q.C., in reply: In *Wiggett* v. *Fox* (³), the defendants had no power to dismiss the person whose negligence caused the accident; here, the defendants had. In *Warburton* v. *Great Western Ry. Co.* (²), the two men were employed on different works: the station master had no control over either except in reference to the rules for the management of the station.

LORD COLERIDGE, C.J.: I am of opinion that the defendants in this case are entitled to succeed, and that judgment should be entered for them. The case raises a question which it is always difficult to deal with, though the principles upon which it depends are well established. The doubt arises from the difficulty of ascertaining whether the facts bring the case within one or other of two well defined rules. The facts in the present case are these: The defendants are the proprietors of a coal mine, and had been sinking a shaft themselves; but ultimately they entered into a contract

(') 5 H. & N., 143. (²) Law Rep., 2 Ex., 30. (³) 11 Ex., 832.

with one Whittle to continue the work. The plaintiff, who up to that time had been employed by the defendants, then became the servant of Whittle, and was paid wages by him. The injury sustained by the plaintiff arose from the negli-
559] gence *of one Lawrence, an engineer appointed by the defendants to work a steam engine which under their contract with Whittle was provided by the defendants to facilitate the work. Lawrence, though employed and paid by the defendants, was with the engine placed under the sole orders and control of Whittle. If under these circumstances the plaintiff and Lawrence were both in the employ of Whittle, the plaintiff is, upon the principle laid down in *Priestly* v. *Fowler* (1) and several subsequent cases, debarred of remedy against the defendants. If Lawrence was not in Whittle's employ, then the defendants are liable. Now, what was Lawrence's position? He was an engineer employed to do something that was necessary to the sinking of the pit. He was originally, and may be now, in the employ of the defendants: but the work he had to do at the time of the accident was a necessary part of the work to be done under Whittle's contract. He was at that time working under the direction of Whittle, the working of the engine being a part of one operation the whole of which was being done by Whittle. The plaintiff therefore was clearly the servant of Whittle, and Lawrence also was in one sense the servant of Whittle, inasmuch as he was working under his orders and subject to his control, although his wages were paid by the defendants. If so, it seems to me that the defendants are not liable. The principle upon which the non-liability of a master for an injury sustained by a servant or workman in his employ through the negligence of a fellow servant or workman rests is this, that, when a man enters upon an employment in the carrying on of which several others are engaged with him, he tacitly agrees to accept the employment subject to all the ordinary risks attending it; one of those risks being the possibility of an injury happening to him from the negligence of those who are engaged with him. I cannot conceive a risk falling more expressly within that definition than the present. The plaintiff must have known that the work above ground might be done negligently, and that those who were working below were liable to suffer injury therefrom. I think the case falls distinctly within *Priestly* v. *Fowler* (1) and the class of cases in which that doctrine has been followed. This being the principle and these the facts which to my mind bring this case within

(1) 3 M. & W., 1,

*it, it would be enough to stop there. Practically [560 and substantially the case is undistinguishable from *Wiggett* v. *Fox* (1) and *Murray* v. *Currie* (2). In both those cases, in a certain sense the person by whom the injury was done was not in the employ of the defendant, yet the courts held that for all practical purposes there was community of employment of both the plaintiff and the person whose negligence caused the injury. The case with which we have been most pressed by the learned counsel for the plaintiff is *Abraham* v. *Reynolds* (3). I must admit that it is very difficult upon the facts of that case to distinguish it from the cases to which it is opposed. The court did, however, distinguish them: but whether or not the facts warranted it is another question. The court thought there was no community of employment between the injured person and the servant of the defendants who caused the injury. The difficulty of this case is that the person injured and the person whose negligence caused the injury were both in the service or under the orders and control of the contractor, and each acting in the performance of a necessary part of the joint operation. The facts seem to me to be more within the principle of *Wiggett* v. *Fox* (1) than the judges in *Abraham* v. *Reynolds* (3) thought the facts there. Upon the authority, therefore, of *Wiggett* v. *Fox* (1) and *Murray* v. *Currie* (2), I am of opinion that the defendants in this case are entitled to judgment.

ARCHIBALD, J.: I am of the same opinion. The question is whether the facts bring this case within the principle of *Priestly* v. *Fowler* (4) and those cases which have followed it. The rule there laid is founded in good sense and general convenience, and we are bound to give effect to it. The facts are these: The plaintiff was in the employ of Whittle, a contractor engaged by the defendants to sink a shaft. In doing the work under that contract, Whittle was to have steam power provided for him by the defendants. Lawrence, the man who drove the engine, though paid by the defendants, was assigned to Whittle for the purpose of lowering and raising the workmen and materials, and was under the sole control of Whittle; and it was through the negligence of *Lawrence that the accident happened [561 to the plaintiff. The real question is whether Lawrence was in the service of Whittle or in that of the defendants. For this purpose, I think he was in the service of Whittle. The injured person and the person whose negligence caused the

(1) 11 Ex., 832.
(2) Law Rep., 6 C. P., 24.
(3) 5 H. & N., 143.
(4) 3 M. & W., 1.

injury were therefore engaged in one common employment, and the case falls within the principle of *Priestly* v. *Fowler* (1). In *Abraham* v. *Reynolds* (2), the Court of Exchequer seemed to think that the facts did not show a common employment. The resemblance between that case and the present, I must admit, is very striking: but I can come to no other conclusion than that this was a case of community of employment, and that in its facts it is much more like *Wiggett* v. *Fox* (3) and *Murray* v. *Currie* (4), than it is like *Abraham* v. *Reynolds* (2). I think Lawrence was in the employ of Whittle, and not of the defendants.

LINDLEY, J.: I am of the same opinion. When the cases are examined, it will be found that the principle of *Priestly* v. *Fowler* (1) has been gradually extended to cases the facts of which are not quite similar to those of that case. It was somewhat extended in *Wiggett* v. *Fox* (3), and still further in *Murray* v. *Currie* (4). The true principle is well stated by my Brother Archibald in *Lovell* v. *Howell* (5). The real difficulty here is in dealing with the case of *Abraham* v. *Reynolds* (2). I must confess I should have thought that that case might have been decided differently: but the principle upon which the court there profess to decide does not differ from that laid down in *Priestly* v. *Fowler* (1). The inference which the court drew from the facts there was that the plaintiff was in no sense in the employ of the defendants. In *Warburton* v. *Great Western Ry. Co.* (6), no such difficulty presented itself: there was no community of employment; though it is true that both the party injured and the person whose negligence occasioned the injury were both bound to obey the station master in all things relating to the regulation of the station. It comes therefore to this, 562] that we feel ourselves unable to *distinguish the present case from *Priestly* v. *Fowler* (1), as extended by *Wiggett* v. *Fox* (3) and *Murray* v. *Currie* (4).

Judgment for the defendants.

June 26. The plaintiff having appealed against this decision,

Finlay, for the defendants, applied to the Court of Appeal to order the plaintiff to give security for the costs of the appeal in the event of his appeal being unsuccessful. He produced an affidavit showing that the plaintiff was out of employment and without visible means of support.

(1) 3 M. & W., 1.
(2) 5 H. & N., 143.
(3) 11 Ex., 832.
(4) Law Rep., 6 C. P., 24.
(5) Ante, at p. 167.
(6) Law Rep., 2 Ex., 30.

Gully, for the plaintiff, submitted that, to require security would be a denial of justice to the injured man; and that, inasmuch as *Wiggett* v. *Fox* (1), the case mainly relied on to sustain the judgment of the court below, had never been discussed in a court of error, the plaintiff ought not to be deprived of the opportunity of doing so on the present occasion.

PER CURIAM (James and Mellish, L.JJ., Baggallay, J.A. and Quain, J.): Under the circumstances, we think the appeal ought to be heard without calling on the plaintiff to give security for costs.

Solicitors for plaintiff: *Torr, Janeway, Tagart & Co.*, for Edwin Hughes, Liverpool.

Solicitors for defendants: *Gregory & Co.*, for A. S. Mather, Liverpool, and Scott & Ellis, Wigan.

(1) 11 Ex., 852.

[1 Common Pleas Division, 568.]

May 29, 1876.

*MACCORD v. OSBORNE. [568

Infant—Ratification of Promise after attaining full Age—9 Geo. 4, c. 14, s. 5.

A recognition when of full age of a debt contracted in infancy, and a promise to pay it "as a debt of honor" when of ability, is not such "a ratification of the contract made during infancy" as is required by 9 Geo. 4, c. 14, s. 5, to charge the party.

THE statement of claim was as follows:

1. The defendant is a gentleman of property, the son of Mr. Edward Baldwin and Mrs. Rebecca Osborne Baldwin. The plaintiff is the sister of Mrs. Rebecca Osborne Baldwin.

2. In the year 1861, the plaintiff at the request of the defendant paid to Mr. and Mrs. Baldwin the sum of £200 to assist them in purchasing furniture for a house, and for the repayment thereof took, among other things, a bill of sale or security upon the furniture from Mr. and Mrs. Baldwin.

3. In the year 1863, the defendant requested the plaintiff to give up her bill of sale or security, in order to enable further money to be raised elsewhere by Mr. and Mrs. Baldwin on the furniture. The plaintiff agreed to do so, provided the defendant would guarantee the repayment of the £200. The defendant thereupon gave the plaintiff an I. O. U. for the £200 signed by *Mr. and Mrs. Baldwin, and a [569 memorandum of guarantee upon it signed by himself together with Mr. Barry Baldwin, his brother.

4. The I. O. U. and guarantee were as follows:

"We I. O. U. two hundred pounds. London, May 4th, 1863.

"Edward Baldwin.
"Rebecca Osborne Baldwin.

"To Miss Maccord.

"Should the above not be paid by my parents, we agree to pay it when we shall be able to do so. Witness our hand subscribed. Dated 4th May, 1863.

"Barry Baldwin.
"Edward S. Baldwin."

The said Edward S. Baldwin is the present defendant, who has assumed the name of Osborne in consequence of having inherited property from an uncle.

5. The parents of the defendant are and always have been unable to discharge the debt.

6. In or about April, 1871, the plaintiff requested payment from the defendant. Thereupon the defendant wrote the following memorandum on the document mentioned in paragraph 4:

"I promise to pay the above as a debt of honor, whenever I may be in a position to pay the same, to Miss Emily Maccord, providing she be living at such time, with interest at the rate of 5 per cent. on the whole sum from due date to payment.

"17 April, 1871. E. S. Baldwin."

7. Since the year 1863 the defendant has paid to the plaintiff at various times interest on the £200, amounting in all to less than £10. The plaintiff is unable to give particulars of these payments of interest or of their dates, further than are contained in the amended reply and joinder in demurrer.

8. Save as aforesaid, the said sum of £200 and interest is still due and unpaid.

9. The defendant is in a position to pay the same, and able to do so.

Claim "£200 due as aforesaid," and "interest thereon at 5 per cent. as per memorandum of 17th April, 1871, till judgment."

Statement of defence:

1. The defendant does not admit any of the allegations in the plaintiff's statement of claim, except those contained in the first and the last paragraphs thereof.

2. In the years 1861 and 1863 the defendant was an infant
570] *within the age of twenty-one years, having been born on the 2d of May, 1843.

3. The defendant submits that the memorandum alleged in the sixth paragraph of the plaintiff's statement of claim to have been written by the defendant (which the defendant does not admit) is not a promise or ratification such as renders him liable to pay the debt claimed in the action, and submits that he never was at any time liable to pay the same.

4. The defendant further says that the alleged cause of action did not accrue within six years before this suit, and that he never paid any sum by way of interest on the debt claimed in this action or otherwise acknowledged the alleged debt as a debt for which he was legally liable to the plaintiff.

Amended reply. The defendant did, in or about April, 1871, on a day of which the plaintiff is unable to give further particulars, pay the sum of £5 on account of interest and of the principal of the said debt, in answer to an application for money on account of the said debt then made by the plaintiff. Issue thereon.

The defendant also demurred to the statement of claim. Joinder (1).

Lord, in support of the demurrer: The question is whether the letter of the 17th of April, 1871, is a ratification by the defendant of a promise made by him during his infancy. Now, the expression "debt of honor" has a known meaning,—as, a debt contracted in a gambling or betting transaction,—and it was evidently written by the defendant with reference to the sense in which it is ordinarily understood. The 9 Geo. 4, c. 14, s. 5, enacts that "no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith." In *Rowe* v. *Hopwood* (2), goods having been supplied by the plaintiff to the defendant whilst the latter *was an [571 infant, when he came of age an account with the items and prices was submitted to him, at the foot of which he signed the following, "Particulars of account to the end of 1867, amounting to £162 11*s.* 6*d.*, I certify to be correct and satisfactory;" and this was held not to amount to a recognition of the debt as an existing liability, so as to be a ratification

(1) By arrangement the second paragraph of the statement of defence was to be read with the statement of claim, upon the argument of the demurrer.

(2) Law Rep., 4 Q. B., 1.

of the contract within the statute. "In order," says Cockburn, C.J., "to be a ratification, there must be a recognition by the debtor after he attained his majority of the debt as a debt binding upon him. There ought to be at least on the part of the debtor an admission of an existing liability, and we ought not to strain the meaning of the words in the document signed by the debtor so as to defeat the operation of the statute passed for his protection."

[BRETT, J.: To amount to a ratification, it must be an express promise, or an acknowledgment of an existing liability from which a promise is necessarily to be implied.]

In *Mawson* v. *Blane* (1), Parke, B., says: "The term 'ratification' has already received an interpretation in the case of *Harris* v. *Wall* (2), where it was held to mean such a ratification as would make a person liable as principal for an act done by another in his name. It seems to me that the meaning of 'ratification' is something different from 'promise.' It is an admission that the party is *liable and bound* to pay the debt arising from a contract which he made when an infant. Therefore, in order to bring this case within the 9 Geo. 4, c. 14, there must be an admission in writing by the defendant that he was liable to pay on that contract which he made when a minor, that is, that he was liable and bound *in præsenti* to pay the acceptance." And Alderson, B., said: "The defendant did not intend by this letter to make himself any more liable than he was before. He was not liable before as acceptor, because when he accepted the bill he was an infant. I think also that the defendant meant to consider himself bound in honor to pay the bill, if the drawer did not."

C. S. C. Bowen, contrà: Looking at the facts disclosed here and at the document itself, it is plain that the defendant, if he meant anything, meant to make himself liable for this debt. It is a debt which he believed himself bound in honor to pay; and he promises to pay it. The statute, 572] it is true, requires a ratification or an *express promise. This is an acknowledgment from which a promise to pay is necessarily to be implied.

[GROVE, J.: To satisfy the statute, it must be an enforceable promise, not a mere recognition of the debt.]

Any written instrument signed by the party, which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification: *Harris* v. *Wall* (2).

(1) 10 Ex., 206, 210; 23 L. J. (Ex.), 342. (2) 1 Ex., 122.

BRETT, J.: Looking to the doctrine laid down in *Rowe* v. *Hopwood* (1), it is obvious that this is not a document upon which the plaintiff can rely as a ratification or promise within 9 Geo. 4, c. 14, s. 5. To amount to that, it must be a recognition by the party after attaining twenty-one of the debt as a debt binding on him. It must be a statement in writing to this effect,—I take this upon me as an existing liability. Does the letter of the 17th of April, 1871, amount to that? I am of opinion that it does not. It is not right to say that a judge is to affect not to know what every body else knows,—the ordinary use of the English language. We do know that there is a place where the expression "debt of honor" has a very significant meaning, and where it is used to distinguish between a debt which can and one which cannot be legally enforced. There is no reason why we should adopt any extreme refinement here. When a man writes "I promise to pay the above as a debt of honor," he does not mean to admit that it is a debt which may be enforced against him at law. I am clearly of opinion that this action cannot be maintained.

GROVE, J.; I am of the same opinion. The only natural sense of this document is, I promise to pay this as a debt of honor when of ability, but I do not acknowledge it to be a debt for which I am legally liable. Mr. Bowen's argument would strike "as a debt of honor" out of the letter altogether.

DENMAN, J., concurred.

Judgment for the defendant.

Solicitors for plaintiff: *Freshfields & Williams.*
Solicitor for defendant: *O. Leefe.*

(1) Law Rep., 4 Q. B., 1.

See 13 Eng. Rep., 73 note; 17 Eng. Rep., 129 note.

An infant, who renders services under a verbal contract, which could not be performed within a year from the date thereof, entered into by and between his employer and his parent, cannot abandon the service in violation of the agreement, and recover upon *quantum meruit* for the services rendered: Abbott *v.* Inskip, 29 Ohio St. R., 59.

A bill to confirm the sale of an infant's land must allege that it is to the minor's interest to confirm the sale. In the defence of innocent purchaser the burden is upon defendant to make it out by proof, and he must show that he paid the purchase-money before notice of complainant's claim. Complainant is not estopped by the admission that while an infant she knew of the proposed sale to a third party, though she did not inform the purchaser of an intention to disaffirm: Roberts *v.* Eblin, 1 Legal Reporter, 318, Supreme Court of Tenn.

Where an infant judgment creditor, by the promise of the judgment defendant and his replevin bail, that, upon her entering satisfaction of such judgment, the former will marry her,

is induced, upon that consideration, alone, to enter such satisfaction, she may, upon her arriving at the age of twenty-one years, and upon the failure of said defendant to marry her, disaffirm such contract, and in a suit against such judgment defendant and his replevin bail, have such entry of satisfaction vacated, notwithstanding that at the time of making such marriage contract she was eighteen years of age: Reish *v.* Thompson, 55 Ind., 34, distinguishing Noble *v.* State, 39 Ind., 352, and Gavin *v.* Burton, 8 Ind., 69.

Infancy is a bar to an action on the case for false and fraudulent representations by a vendor or pledgor as to his ownership of property sold or pledged: Doran *v.* Smith, 49 Verm., 353; Gilson *v.* Spear, 38 Verm., 311; Grove *v.* Nevill, 1 Keble, 778.

As to what acts after majority amount to a ratification by an infant and what do not, see Trader *v.* Lowe, 45 Md., 1, 11; Montgomery *v.* Witbeck, 23 Minn., 172; Shillock *v.* Gilbert, 23 Minn., 386.

[1 Common Pleas Division, 573.]

Aug. 7, 1876.

[IN THE COURT OF APPEAL.]

573] *BATSON v. NEWMAN.

Wager—Contribution towards Prize to be awarded to Winner—8 & 9 *Vict. c.* 109, *s.* 18.

H. and B. deposited £50 each with N., and entered into a written agreement that the £100 should be paid to H. if his horse trotted eighteen miles in an hour, and if not, then to B. The referee decided that the horse did trot the distance within the hour. B. demanded his £50 back from N. before the money had been paid over to H.:

Held, affirming the decision of the Common Pleas Division, that B. was entitled to recover his stake back from N., for that the transaction was simply a wager, and did not come within the proviso in 8 & 9 Vict. c. 109, s. 18, as to contributions to a prize, or sum of money to be awarded to the winner of any lawful game, sport, pastime, or exercise.

THIS was an appeal from a decision of the Common Pleas Division refusing an order *nisi* to enter a verdict for the defendant.

On the 17th of August, 1875, the plaintiff and John Hawkins entered into the following agreement:—

"An agreement made this 17th day of August, 1875, between John Hawkins, of, &c., and John Batson, of, &c.

"The said John Hawkins wagers the amount of £50 that his horse Jack trots eighteen miles in one hour, within the space of three weeks to one month from this date. The said John Batson wagers the said sum of £50 that the said horse will not do so.

"The said horse is to trot between Lichfield and Derby, Mr. Hawkins to have choice of way. The horse to be on the mark at two o'clock on the day on which the wager is to be decided. The said John Hawkins to give three days' clear notice to the said John Batson before the wager

is decided; such notice to be sent by registered letter by post.

"In case of any dispute, the decision of Mr. Robert Owen (the referee agreed to between both parties) shall be final, and there shall be no appeal from his decision. The expenses of the referee shall be paid out of the stakes. The amount of £100 is now in the hands of Mr. Joseph Newman, the stakeholder, and such amount is to be paid by him to either the said John Hawkins or the said John Batson, as the referee may direct. The referee to be timekeeper.

*"If either party do not comply with this agree- [574
ment, the amount deposited by him with the stakeholder to be forfeited."

On the 17th of September the trotting came off, and the referee certified that the horse had trotted the eighteen miles within the hour. The defendant, who was stakeholder, accordingly paid over the £100 to Hawkins.

The plaintiff, in September, 1875, commenced an action for the whole £100, but subsequently, by leave, amended his writ by adding a claim for £50, one moiety of the £100.

At the trial before Coleridge, C.J., the defendant admitted that before he paid over the stakes to Hawkins the plaintiff had asked to have his £50 back. A verdict was taken for the plaintiff for £50, execution being stayed that the defendant might move. He accordingly moved for an order *nisi* to enter a verdict for him, which was refused on the ground that the case was governed by *Varney* v. *Hickman* (1) and *Aubert* v. *Walsh* (2), and did not come within the proviso in 8 & 9 Vict. c. 109, s. 18 (3), nor within the authority of *Batty* v. *Marriott* (4).

Aug. 7. *Maurice Powell*, for the defendant, renewed his motion before the Court of Appeal. The question is whether this transaction comes within the proviso in 8 & 9 Vict. c. 109, s. 18, and it is submitted that it does, for that the stakes were contributions to a "sum of money to be awarded to the winner of a lawful sport, pastime, or exercise." *Batty*

(1) 5 C. B., 271.

(2) 3 Taunt., 277.

(3) 8 & 9 Vict. c. 109, s. 18: "All contracts or agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void, and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." Proviso, "that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

(4) 5 C. B., 818.

v. *Marriott*(') is in point. If it is a race, *Evans* v. *Pratt*(') shows that it is legal, but it comes under the head of "pastime," rather than of "race."

[MELLISH, L.J.: How could there be a "winner" here? Does not the word import competition between two or more?]

575] *[*Brown* v. *Overbury*(') was also referred to.]

JAMES, L.J.: I am clearly of opinion that this transaction is a bet and nothing else, and does not come within the proviso in 8 & 9 Vict. c. 109, s. 18. There was not, in my opinion, any contribution to a prize or sum of money to be awarded to a winner.

MELLISH, L.J.: I am of the same opinion. The Court of Common Pleas, in *Batty* v. *Marriott*(1), after some hesitation held that a case where only two persons contributed came within the proviso. We are asked to go further, and to decide that a case where only one person is to do anything comes within it. There can only be a winner when two or more persons are to compete in doing something. Here nobody but Hawkins was to do anything, and the case is simply one of wagering.

BAGGALLAY, J.A., concurred.

Appeal dismissed.

Solicitors for defendant: *J. & F. Needham.*

(1) 5 C. B., 818. (2) 3 M. & G., 759. (3) 11 Ex., 715.

[1 Common Pleas Division, 578.]

April 28, 1876.

578] *ARNOLD and Others v. THE CHEQUE BANK.

THE SAME v. THE CITY BANK.

Money received by means of a forged Indorsement—Negligence in the Custody or Transmission of Securities by Post—Estoppel—Conversion.

Negligence in the custody of a draft or in its transmission by post will not disentitle the owner of it to recover the draft or its proceeds from one who has wrongfully obtained possession of it.

Negligence, to amount to an estoppel, must be in the transaction itself, and be the proximate cause of leading the third party into mistake, and also must be the neglect of some duty which is owing to such third party or to the general public.

The plaintiffs, merchants at New York, desiring to transmit £1,000 to W. & Co., of Bradford, purchased of S. & Co., in New York, a draft for that amount drawn by S. & Co., on Smith, Payne & Co., London, payable to the order of the plaintiffs on demand. The plaintiffs indorsed the draft specially to W. & Co. or order, and inclosed it in a letter addressed to them which was placed in a letter-box in their office to be posted in the usual way. The letter was stolen by one Hecht, a clerk in the employ of the plaintiffs, who forged an indorsement of W. & Co., and procured the defendants, bankers in London, to present the draft and obtain the money, which was placed by them to

the account of a person acting in concert with Hecht, upon whose checks the money was almost immediately drawn out.

In an action for money had and received, the defendants, in order to show that the negligence of the plaintiffs in the custody and transmission of the draft afforded facilities for the fraud, and so estopped them from suing for the money, tendered evidence that it was an usual and almost invariable practice amongst merchants sending large remittances from abroad to send, besides the letter containing the remittance, a letter of advice by the same or the next mail. This evidence was rejected, on the ground that the alleged negligence was collateral only to the transaction giving rise to the action:

Held, that the plaintiffs' right to the draft, and to sue for the proceeds thereof in the hands of the defendants as money received to their use, was not affected by the felonious act of Hecht; and that the evidence tendered was properly rejected.

THESE were actions for money had and received brought by the plaintiffs to recover from the defendants respectively the proceeds *of two drafts for £1,000 each, upon [579 the ground that they were received by the respective defendants under circumstances which in point of law made them moneys received to the use of the plaintiffs.

The two cases were tried together before Lord Coleridge, C.J., at the London sittings after Trinity Term, 1875. The facts which were proved in *Arnold* v. *Cheque Bank* are fully set out in the judgment.

In *Arnold* v. *City Bank* the bill was drawn by Stewart & Co., of New York, upon Smith, Payne & Smith, bankers in London, and was made payable to the order of D. H. Arnold & Co., on demand, and was specially indorsed by D. H. Arnold & Co. to Firth, Boon & Co., of Bradford. Stewart & Co. had funds in the hands of Smith, Payne & Co. sufficient to meet both drafts.

On the 11th of September, 1874, an hotel keeper who was a customer of the Tottenham Court Road branch of the City Bank introduced to the manager a person who wished to open an account there. This person tendered the draft for £1,000, which had on it a forged indorsement purporting to be by Firth, Boon & Co., and himself indorsed it with the name of "Adolphus Hornby." The manager caused the bill to be presented at Smith, Payne and Smith's, and obtained the money for it, which he entered to the credit of Adolphus Hornby, who drew out substantially the whole of it in two or three days. In all other respects the two cases were similar in their circumstances, and in each a verdict was directed to be entered for the plaintiffs.

Nov. 9. Sir *H. James*, Q.C., obtained in each case an order *nisi* for a new trial on the ground of the improper rejection of evidence of the plaintiffs' neglect of the ordinary usage of merchants; and for misdirection in directing a verdict to be entered for the plaintiffs, because the money

claimed in the action was not the plaintiffs' money, and the defendants had been guilty of no wrongful conversion, and had received no money to the use of the plaintiffs; and that the plaintiffs were precluded from recovering by reason of their neglect of proper precautions in the custody and dispatch of the drafts.

Feb. 25. *Day*, Q.C., *Cohen*, Q.C., and *Finlay*, showed 580] cause: *Adolphe Hecht, the person who is supposed to have purloined the letters, having obtained the bills by fraud, and the money having been received by the defendants by means of a forged indorsement, the property in the bills never passed from the plaintiffs, and the proceeds became money received by the defendants to their use. Evidence as to negligence in the custody and transmission of the bills was clearly inadmissible: the negligence to charge the plaintiffs must be negligence in the immediate transaction, and in the performance of some duty to the party who sets up the negligence. It may be that, if Stewart & Co. had been guilty of any negligence, Smith, Payne & Smith would have had an answer as against them; but there was no negligence here (even if the evidence was admissible) which could estop Arnold & Co. from saying that the bills remained theirs, and that they were entitled to claim the proceeds; for, negligence to create an estoppel must be such as to amount to misrepresentation. There was no negligence on the part of Arnold & Co. which can in a court of law be considered as the proximate cause of the loss of the money.

[The following cases were referred to: *Ex parte Swan* (1); *Swan* v. *North British Australasian Co.* (2); *Bank of Ireland* v. *Evans's Charities in Ireland* (3); *Young* v. *Grote* (4), as explained by Parke, B., in *Robarts* v. *Tucker* (5), and by Williams, J., in *Ex parte Swan* (1); *Ingham* v. *Primrose* (6); *Ogden* v. *Benas* (7); *Hollins* v. *Fowler* (8); *Carr* v. *London and North Western Ry. Co.* (9); *Foley* v. *Hill* (10); *Johnston's Case* (11).]

Feb. 28. Sir *Henry James*, Q.C., *Benjamin*, Q.C., and *R. T. Reid*, for the Cheque Bank, in support of the order: There was abundant evidence that the plaintiffs had been guilty of negligence in the custody and transmission of the

(1) 7 C. B. (N.S.), 400; 30 L. J. (C.P.), 113.
(2) 2 H. & C., 175, 181; 32 L. J. (Ex.), 273, 294.
(3) 5 H. L. C., 389.
(4) 4 Bing., 253.
(5) 16 Q. B., 579.
(6) 7 C. B. (N.S.), 82; 28 L. J. (C.P.), 294.
(7) Law Rep., 9 C. P., 513.
(8) Law Rep., 7 H. L., 757.
(9) Law Rep., 10 C. P., 307.
(10) 2 H. L. C., 28.
(11) Law Rep., 6 Ch., 212.

drafts; and the effect of that evidence was for the jury, and ought not to have been withdrawn from them. The evidence of negligence was substantially this: It was known to every clerk in the plaintiffs' office that the *letters [581 containing these drafts were placed for transmission in a letter-box to which all of them had access, and yet no inquiry was made as to whether, or by whom, or when they had been posted; and, although Adolphe Hecht absconded under such suspicious circumstances on the 26th of August and his brother Jacob a few days later, no inquiry seems to have been made after them, nor was any attempt made to stop the negotiation of the drafts until the 6th of October, ten or twelve mails having left New York in the interim. The Celtic, by which the letters containing the drafts were intended to go, left New York on the 21st of August. A vessel called the Bothnia, which sailed from New York on the same day on which Adolphe Hecht absconded, arrived in London on the 6th of September; and the drafts were not presented at Smith, Payne & Smith's until the 10th and 11th. Arnold & Co. wrote to Williams & Co. on the 26th of August a letter which probably came over by the Bothnia, but in which no reference is made to their having transmitted them the draft for £1,000 on the 21st. Thus, every opportunity was given for the perpetration of the theft, the escape of the felon, and the obtaining payment of the stolen drafts.

[LORD COLERIDGE, C.J.: It would have been for the jury, no doubt, if there was any negligence on the part of the plaintiffs which conduced to the fraud: but I was of opinion that there was none. A man may be more careless with regard to the custody of a thing that can be made available only by means of a forgery than if by mere larceny.]

That seems a startling and novel doctrine. Evidence, moreover, was tendered to show that it is usual among merchants where bills to large amounts are transmitted by post, to forward a separate letter of advice by the same or another mail. Surely that was fit for the consideration of the jury. It is not contended that negligence in the owner of a chattel prevents him from following it if stolen: but it is submitted that the rule is different in relation to negotiable instruments, which are intended to pass by written transfer, and are created for the purpose of passing from hand to hand. Whenever one of the two innocent persons is to suffer for the fraud of a third, the loss must fall upon him whose negligence has given the opportunity for the commission of

582] the fraud: *Halifax* * *Union (Guardians)* v. *Wheelwright* (1). The same doctrine is laid down in *Lickbarrow* v. *Mason* (2), and by several of the judges in *Swan* v. *North British Australasian Co.* (3).

Thesiger, Q.C., and *F. M. White* were with Sir *Henry James*, Q. C., in *Arnold* v. *City Bank.*

LORD COLERIDGE, C.J.: We entertain no doubt in this case; but, as it involves a question of considerable importance, we propose to defer our judgment until a future day.

Cur. adv. vult.

April 28. The judgment of the court (Lord Coleridge, C.J., and Archibald and Lindley, JJ.), which applied to both cases, was delivered by

LORD COLERIDGE, C.J.: In this case the action is brought by the plaintiffs claiming, as the owners of a draft for £1,000, to recover the proceeds from the defendants, on the ground that they were received under circumstances which make such receipt a receipt to the use of the plaintiffs.

The facts, as they appeared before me at the trial, were as follows: The plaintiffs, merchants at New York, desiring to transmit £1,000 in payment to their correspondents, Messrs. E. G. Williams & Co., of Bradford, England, purchased of Stewart & Co., in New York, the draft in question, which was dated the 21st of August, 1874, and drawn by Stewart & Co. on Smith, Payne & Co., bankers in London, for £1,000, payable to the order of D. H. Arnold & Co., on demand. The plaintiffs having thus obtained the draft, a special indorsement to Messrs. Williams & Co. was written upon it, and it was inclosed by the plaintiffs in a letter to Messrs. Williams & Co. for the purpose of transmission. The letter was then placed, with others, at the office of the plaintiffs, in a box, on the outside of which were painted the words "Letter Box," and which was the place in which letters for the post were usually deposited. The envelope was addressed to Messrs. E. G. Williams & Co., Bradford, and had the name Celtic written on it, that being the name of the steamer sailing the next day, by which the mail was sent.

583] *The duty of taking letters from the box in question and conveying them to the post was performed by one of two clerks in the office of the plaintiffs, named Adolphe Hecht and Jacob Hecht, whichever happened to be disengaged. The letter in which the draft was inclosed was in the following terms:

(1) Law Rep., 10 Ex., 183.
(2) 2 T. R., 71.
(3) 2 H. & C., 175, 181; 32 L. J. (Ex.), 273.

"New York, August 21st, 1874.

"Messrs. E. G. Williams & Co., Bradford.

"Dear Sirs,—We hand you herewith No. 2,132, first bill of exchange, payable on demand, on Messrs. Smith, Payne & Smith, London, for £1,000, which please pass to our credit under advice. Why don't you make us a good shipment of No. 315 Italians? We are entirely out.

(Signed) "W. H. Arnold & Co."

Instead, however, of the letter having gone through the post to Messrs. Williams & Co., it was abstracted by some person who had means of access to it, and the draft was stolen: but these facts did not become known to the plaintiffs until after payment of the draft had been obtained by the defendants.

It further appeared that Adolphe Hecht had left the employ of the plaintiffs on the 26th of August, without assigning any reason, and with some portion of his wages unpaid.

On the 10th of September, 1874, a Mrs. Chandler called at the defendants' bank with the draft in question. It then bore on it a forged special indorsement by Messrs. E. G. Williams & Co. to "D. H. Chandler, or order," and a blank indorsement by "D. H. Chandler." Mrs. Chandler came to the defendants without introduction. She was a middle aged lady of respectable appearance, and said she was from America. She inquired as to the manner in which the defendants conducted their business, and asked if the defendants would receive the draft. She was answered that they would, but that it must first be realized before they could give an equivalent in checks. She stated that she did not wish to go to the city that day, and inquired whether the defendants had any one they could send, as it was a draft payable to bearer. The defendants informed her that they had messengers going continually to the city, and would send for her, and then took the draft, and, after stamping it with the name *of the Cheque Bank, sent it to [584 Smith, Payne & Co., and received the amount.

The bank on receiving the money opened an account with Mrs. Chandler, crediting her with £1,000, and Mrs. Chandler received check books, by means of which she drew out the whole amount with the exception of £106.

Evidence was tendered by the defendants, which was rejected, of an usual or almost invariable practice of sending, besides the letter containing the draft, a letter of advice by the same or another ship, for the purpose of showing that the plaintiffs had by negligence afforded facilities for the fraud which had been practised; and, in the result, a ver-

dict was directed for the plaintiffs for the amount of the draft and interest.

On the 9th of November last, an order *nisi* was obtained by Sir Henry James to set aside the verdict, and for a new trial, on the ground of the rejection of evidence of the plaintiffs' negligence of the ordinary usage of merchants, and in directing a verdict to be entered for the plaintiffs because the money claimed in the action was not the plaintiffs', and the defendants had been guilty of no act of conversion, and had received no money to the use of the plaintiffs; and that the plaintiffs were precluded from recovering, by neglect of proper precautions, in the custody and dispatch of the draft.

Against this order cause was shown on the 25th and 28th of February last. The questions raised were mainly these,—1, whether, under the circumstances, the money received by the defendants in payment of the draft was received to the use of the plaintiffs,—2, whether there was any evidence of negligence by which the plaintiffs were estopped from setting up against the defendants their title to the draft,—3, whether the evidence rejected was admissible for the purpose of showing such negligence.

As regards the first question, it is clear that the property in the draft had never in fact passed out of the plaintiffs; for, indorsement consists not merely of the written indorsement on the draft, but there must also be a delivery with intention to transfer the property: *Marston* v. *Allen* (1). 585] In this case there was no *delivery of the draft to the indorsee, and therefore, unless the plaintiffs are estopped from setting up as against the defendants the forgery of the indorsement of Williams & Co., the bill remained their property when it reached the hands of the defendants, and they are entitled to the draft, for, the statute 16 & 17 Vict. c. 59, s. 19, only protects Messrs. Smith, Payne & Co., the drawees (*Ogden* v. *Benas* (2)), from the consequences of paying the draft on a forged indorsement, and affords no protection to the defendants.

But it was argued that the money received by the defendants could not be regarded as money received to the use of the plaintiffs, because the defendants had been guilty of nothing like a conversion, but had acted as a mere conduit to receive and hand over the amount of the draft to their customer, Mrs. Chandler.

In the case of goods, if a man takes and sells them when he has no right, the owners may waive the tort and recover

(1) 8 M. & W., 494. (2) Law Rep., 9 C. P., 513.

the proceeds in an action for money had and received: *Lamine* v. *Dorrell* (1); *Neate* v. *Harding* (2); and see *Hollins* v. *Fowler* (3): and equally, as was admitted by the defendants, if a person wrongfully convert a bill of exchange and receive the amount, the owner of the bill may either sue in tort or may waive the tort and recover the money as received to his use.

The question here is, whether what was done by the defendants amounted to a conversion of the bill: and we are of opinion that it did. Payment of the draft was actually obtained by the defendants from Smith, Payne & Smith; and the next step in dealing with the money was not simply to hand it over to Mrs. Chandler, but to retain it and open an account with her, the effect of which was to appropriate it to their own use as a loan from Mrs. Chandler: see *Pott* v. *Clegg* (4). Under these circumstances, there was nothing in the transaction at all analogous to a mere packing by a packer, or carriage by a carrier, of goods intrusted to them by a person having no title: *Greenway* v. *Fisher* (5); and see *Hardman* v. *Booth* (6): nor is the employment of banker a public employment which he is in any way bound to exercise. The defendants *were at liberty to take [586 the bill or not as they chose. They took it, and received the amount. The evidence also was that the defendants made use of their customers' money by lending it at interest; so that, although no interest or commission was charged on the account, they nevertheless derived benefit from the transaction.

We are of opinion, therefore, as the property in the bill remained in the plaintiffs, that the money was received by the defendants, under a mistake, it is true, but tortiously as against the plaintiffs, and that, subject to the question whether the plaintiffs have by their conduct disentitled themselves to sue, they may waive the tort and recover the proceeds as money received to their use.

On the second and third points it was contended by the defendants that there was evidence of negligence in the custody and transmission of the draft by the plaintiffs, which afforded facilities for the forgery and fraud by which the defendants were induced to receive it, and that the evidence which was rejected would have shown an almost invariable custom for merchants in America remitting bills to

(1) Ld. Raym., 1216.
(2) 6 Ex., 349.
(3) Law Rep., 7 H. L., 757; 44 L. J. (Q.B.), 169.
(4) 16 M. & W., 321.
(5) 1 C. & P. 190.
(6) 1 H. & C., 803; 32 L. J. (Ex.), 105.

correspondents in England to send another independent letter of advice either by the same or a subsequent mail, and that there were opportunities of sending such a letter by other vessels leaving on the same day as the Celtic, or on subsequent days, which would have arrived in time to have enabled Messrs. Williams & Co., in the event of their not having received the draft in due course, to have communicated with Smith, Payne & Smith, either by letter or telegram, to have stopped payment.

We are of opinion, however, that there was no evidence of negligence which could operate by way of estoppel to the plaintiffs, and also that the evidence rejected was properly excluded, on the ground that it would not, if admitted, have amounted to any defence.

Reliance was placed by the defendants on the case of *Young* v. *Grote* (1). That case, no doubt, must be considered as well decided: but various opinions have been expressed as to the real ground of the decision. In the judgment of 587] Parke, B., in *Robarts* v. **Tucker* (2), it was put on the ground that the customer had by signing a check given authority to any one in whose hands it was to fill it up in whatever way the blank permitted. But we have only to look at the case itself to see that it really proceeded on the authority of the extract from Pothier cited in the judgment of Best, C.J., which makes the inability to recover depend upon the fault of the drawer of the check in the mode of drawing it, and is entirely consistent with the rule laid down and explained on fuller consideration in subsequent cases, viz., that negligence, in order to estop, must be negligence in the transaction itself: see per Blackburn, J., in *Swan* v. *North British Australasian Co.* (3). Indeed, in a later case, *Bank of Ireland* v. *Evans's Charities* (4), this is stated by Parke, B., himself to be the true ground of decision. He says: "In that case it was held to have been the fault of the drawer of the check that he misled the banker on whom it was drawn by want of proper caution in the mode of drawing the check, which admitted of easy interpolation, and consequently that the drawer having thus caused the banker to pay the forged check by his own neglect in the mode of drawing the check itself, could not complain of that payment."

The rule which is expressed by Ashhurst, J., in *Lickbarrow* v. *Mason* (5),—"We may lay it down as a broad gen-

(1) 4 Bing., 254.
(2) 16 Q. B., 560.
(3) 2 H. & C., 181; 32 L. J. (Ex.), 277.
(4) 5 H. L. C., 389.
(5) 2 T. R., 70.

eral principle, that, whenever one of two innocent parties must suffer by the act of a third person, he who has enabled such person to occasion the loss must sustain it,"—was, though not expressly referred to, observed and acted on in *Youny* v. *Grote* (1); and it has received illustration and explanation in subsequent cases on the subject which show that the words "enabling a person to occasion the loss" must be understood to mean, by some act, conduct, or default in the very transaction in question: see *Freeman* v. *Cooke* (2).

The correct rule seems to us to be that which is thus stated by Blackburn, J., in his judgment in *Swan* v. *North British Australasian Co.* (3), where, referring to the judgment of Wilde, B., below, *he says, "that he omits [588 to qualify the rule (he had stated) by saying that the neglect must be in the transaction itself and be the proximate cause of leading the party into that mistake; and also must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public, of whom that person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons with whom those seeking to set up the estoppel are not privy." *Young* v. *Grote* (4), when correctly understood, is in entire accordance with the rule thus expressed. So is *Ingham* v. *Primrose* (5), also cited to us, in which the negligence was in the destruction of a draft afterwards put together and fraudulently presented; while, in the case of *Bank of Ireland* v. *Evans's Charities* (6), it was expressly held both that the negligence in order to operate as an estoppel must be negligence "in or immediately connected with the transfer itself," and further that it must also be "the proximate cause of the loss." We may also refer to the judgment of Williams, J., in *Ex parte Swan* (7), as showing the distinction between *Young* v. *Grote* (4) and those cases in which the neglect, if any, was collateral to the transaction.

Let us inquire, then, how far there was in this case any actual proof of such neglect, or of any breach of duty to the defendants as members of the general public.

No authority whatever was cited to us for the contention that negligence in the custody of the draft will disentitle the owner of it to recover it or its proceeds from a person who has wrongfully obtained possession of it. Here, there

(1) 4 Bing., 254.
(2) 2 Ex., 654; 18 L. J. (Ex.), 117.
(3) 2 H. & C., 181; 32 L.J. (Ex.), 277.
(4) 4 Bing., 253.
(5) 7 C. B. (N.S.), 82; 28 L. J. (C.P.), 294.
(6) 5 H. L. C., 389.
(7) 7 C. B., (N.S.), 400; 30 L. J. (C.P.), 113.

was nothing in the draft or the indorsement with which the plaintiff had anything to do, calculated in any way to mislead the defendants. It was regularly indorsed, and was then inclosed in a letter to the plaintiffs' correspondents, to be sent through the post. There could be no negligence in relying on the honesty of their servants in the discharge of their ordinary duty, that of conveying letters to the post; nor can there be any duty to the general public
589] to *exercise the same care in transmission of the draft as if any or every servant employed were a notorious thief. It may be said here, as in the case of *Bank of Ireland* v. *Evans's Charities* (1), merely substituting for the "custody of the seal," "the posting of the letter," and for "the act of transfer," "the receipt of the draft by the defendants," "If there was negligence in the custody of the seal, it was very remotely connected with the act of transfer. The transfer was not the necessary, or ordinary, or likely result of that negligence. It never could have been but for the occurrence of a very extraordinary event, that persons should be found either so dishonest or so careless as to testify on the face of the instrument that they had seen the seal duly affixed." And in that case it is asked, "If such negligence could disentitle the plaintiffs, to what extent is it to go? If a man should lose his check book, or neglect to lock the desk in which it is kept, and a servant or a stranger should take it up, it is impossible to contend that a banker paying his forged check would be entitled to charge his customers with that payment."

The cases thus put are quite as strong or stronger cases than the present, both as to negligence and as to its connection with the subsequent fraud; for here the fraud could not have been committed without a larceny of the letter and a forgery of the indorsement. We are of opinion, therefore, that there was no neglect proved sufficient to disentitle the plaintiff from relying on the forgery of the indorsement.

It remains to be considered whether the evidence tendered was properly rejected. All that it proposed to prove was, that it was an almost invariable custom on the part of merchants remitting from America, to send a duplicate letter of advice either by the same or another subsequent vessel,—a step which though prudent as regards the sender, and which might or might not have led to communications which would have stopped payment of the bill and prevented the proceeds being received by the defendants, was

(1) 5 H. L. C., 389.

entirely collateral to the transmission of the draft, and which it certainly was no part of the duty of the plaintiffs either to Messrs. Williams & Co. or to the general public to have sent. If it were the duty of the plaintiffs to guard against larceny and *forgery in that way, it is im- [590
possible to say where, as observed by Parke, B., in *Bank of Ireland* v. *Evans's Charities* (1), on that principle, it is to stop. The post office is a recognized means of transmitting letters with their contents (not being actual money), in the regularity of which full confidence may be placed. But, if there be such a duty in this case, the breach of which would amount to a neglect of proper precaution, and disentitle the plaintiff to sue, it would equally be negligent on the part of every sender of a check for a large amount not to send a separate letter of advice with it, which would entail upon the senders of checks new and unheard of responsibilities. Besides, this duty would be collateral to the indorsing and forwarding of the draft, and the omission of it could in no sense be considered as the proximate cause of the larceny and forgery which have occurred; and no authority has been cited to us to the effect that any such failure of a precaution merely collateral could in any way affect the title of a plaintiff to sue.

We are of opinion, therefore, that the evidence tendered was rightly rejected; and for these reasons we think that the order should be discharged, and with costs.

Order discharged.

Solicitors for plaintiffs: *Field, Roscoe, Osbaldeston & Co.*, for Taylor & Co., Bradford.

Solicitors for Cheque Bank: *Nash, Field & Mathews.*

Solicitors for City Bank: *Linklater, Hackwood, Addison & Brown.*

(1) 5 H. L. C., 389.

See 1 Abb. N. Y. Dig., 538–9, §§ 884–901; 2 U. S. Dig., First Series, 727 *et seq.*; 1 Fisher's Dig., 1296 *et seq.*; Id., 1179; 5 Fisher's Dig., 9258; Edwards on Prom. Notes (1st ed.), 188–192, 289–291; Bobbett *v.* Pinkett, *post*, p. 368.

Detinue for a check. Plea that defendants received the check from the plaintiff to present and collect it from the bank on which it was drawn; that they did present it, but payment was refused by the bank manager, who retains and keeps the same, alleging that the names of the drawers thereto are forged: Held, on demurrer, that the plea showed a good defence; for if the check was forged the detention was rightful, and if genuine, defendants lost control over it by no wrongful act, and the plaintiff's remedy was against the bank: Browne *v.* Livingstone, 21 Upper Can. Q. B., 438.

The drawer is bound to know the signature of the drawee but not of the payee: Canal Bank *v.* Bank of Albany, 1 Hill, 287; Holt *v.* Ross, 54 N. Y., 472.

Bankers are presumed and bound to

know the signatures of their customers, and they pay checks purporting to be drawn by them at their peril ; so held, as to checks forged by the depositor's confidential clerk : Weisser *v.* Denison, 10 N. Y., 68 ; National Park, etc., *v.* Fourth, etc., 46 N. Y., 77, reversing 7 Abb. Pr., N.S., 120, 55 Barb., 87 ; Bank of Commerce *v.* Union, etc., 3 N. Y., 230 ; National, etc., *v.* Grocers, etc., 2 Daly, 289 ; Ellis *v.* Ohio Life, etc., 1 Handy, 97, affirmed, 119 ; Goddard *v.* Merchants' Bank, 4 N. Y., 147 ; Rogers *v.* Ware, 2 Neb., 58.

Though this only applies to the signature of the bill and not to the body of the bill : Bank Commerce *v.* Union, etc., 3 N. Y., 230 ; Morgan *v.* Bank, 11 N. Y., 404 ; Security Bank *v.* Nat. Bank, 67 N. Y., 458.

A certificate of deposit payable to the order of the depositor on the return of the certificate was issued by bank A. to T. D., who could not write. The bank took his mark on its signature book, and wrote a description of him opposite. Shortly afterward the certificate was stolen from T. D., and presented to bank B. by a stranger who gave his name as T. D., and said he could not write. Thereupon the cashier of bank B. indorsed the certificate to his own order with the name of T. D., to which the stranger made his mark, and an employee of bank B. added his signature as "witness to mark." The cashier then indorsed the certificate and sent it, through a correspondent to bank A., which thereupon paid it, and the money was handed over to the stranger. Thereafter the real T. D. appeared at bank A., and on discovery of the forgery bank A. paid him the amount and brought suit against bank B. to recover the payment on the forged indorsement : Held, that bank A. had a right to rely on the identification of T. D. by bank B., and could recover : State, etc., *v.* Freedmen's, etc., 2 Dillon, 11.

This case turned on the fact that the payee named in the certificate could not write, and that bank B. had assumed to identify, and through its agent certify to the identity of the person who by mark had indorsed the certificate. The rule would have been otherwise had the payee been able to write : Stout *v.* Beuvist, 39 Missouri, 277.

The drawee of a bank check is presumed to know the signature of the drawer, and if the drawee pays a forged check to the holder, he will not be entitled to recover back the money so paid, where there has been no fraud practised upon him. This doctrine proceeds on the ground that the loss has arisen through some neglect or default, and the presumption being that the drawee knows the handwriting of the drawer, if he pays a forged check, it is presumed to be through some carelessness on his part, and the law imposes the loss on him.

The drawee, or payor, of a forged bank check can recover back the amount paid by him on it, when the holder, or payee, is himself at fault, or has been guilty of fraudulent practices which may have thrown the drawee off his guard. Where the holder of a forged check, which he had received and paid for without knowing that it was a forgery, after acquiring knowledge of facts calculated to arouse suspicion that it was such, presented it at the bank on which it was drawn, and demanded payment, without disclosing such facts, and was told by the teller of the bank that he did not certainly know the signature to the check, and would only pay it on condition that the holder would indorse it, and thereupon the holder did indorse it, and receive the money thereon, and the bank, within a few hours, discovered the forgery, and demanded that the money be refunded ; it was held, that the drawee could recover the money thus paid.

An estoppel arising out of a presumption, in pursuance of legal obligation, as understood in commercial law, concerns conscience and equity, and the party who would avail of it must himself have acted in good faith toward the party on whose conduct he relies, or it will constitute no bar to the assertion of the truth.

Where the holder of a forged check presented it to the drawee and received payment on it, and withheld knowledge which he then possessed of facts which rendered it morally certain that the check was a forgery, he is not in a position to set up in a suit brought to recover back the money, that the drawee was obliged to know the signature of his own depositors, and that he is

estopped to say that he was mistaken: First National, etc., *v.* Ricker, 71 Ills., 439.

The rule that the maker of a note is bound to know his own signature does not apply to the executor or administrator of the maker. If the executor or administrator pay a forged note of the deceased, he may recover back the money paid: Wilson *v.* Alexander, 4 Ills., 392.

Where a bank paid a check on the forged signature of one of its depositors, returned it to the clearing house where it was charged to the bank which sent it for collection and credited it to the bank so paying, held the payment by the bank sending it for collection was not voluntary, and that it could recover of the bank paying the check: National, etc., *v.* Grocers, etc., 2 Daly, 289.

Payment of forged commercial paper, without inspection, under circumstances giving the party paying no previous opportunity for inspection, does not, of itself, preclude a recovery back of the money so paid. The party paying, however, is bound to use due diligence in making the inspection as soon as he has the opportunity, and in giving notice of the forgery; and if by his failure to do so the party receiving payment is prejudiced, such negligence will defeat a recovery.

The banking house of O. & Co. had an arrangement with defendant, by which the latter agreed to take up each day, at the clearing house, all commercial paper of the former there presented by other banks; upon being notified of the amount, O. & Co. were forthwith to send their check therefor and to receive the paper, and if, upon inspection, any portion should prove not to be good, O. & Co., upon sending back to the bank through which it came, before the close of banking hours, were to be entitled to a credit for the amount. On a certain day O. & Co. received the usual statement and sent check for the amount, receiving therefor the paper making up the amount of the statement. Among them was a forged certificate of deposit, purporting to be signed by O. & Co., which was not presented at the clearing house, but was sent by plaintiff to defendant for collection. On arriving at the office of O. & Co. the certificate was examined by their cashier, who passed it to the book-keeper with other paper. After the close of banking hours the forgery was discovered, and O. & Co. immediately notified plaintiffs, and also telegraphed to plaintiff's principal from whom they had received the certificate for collection. Plaintiffs received the notice prior to the acknowledgment by them of the receipt of the certificate. On the next day O. & Co. returned the certificate to defendant and were credited back the amount. In an action to recover the amount of the certificate, held that the payment by O. & Co., under the circumstances, did not preclude them from claiming a restitution of the money; that the action of the cashier was not a binding recognition of the genuineness of the certificate, nor did the failure to discover and give notice of the forgery during business hours render the previous conditional payment absolute; and, therefore, that defendant was justified in refunding the money: Allen *v.* Fourth National, etc., 59 N. Y., 12.

A forged check was deposited on Saturday with the defendant bank and on Monday it was delivered to the plaintiff, the drawee bank, in the exchanges through the clearing house; the depositor drew against the deposit on Monday after the exchanges were made. On Tuesday the plaintiff notified the defendant of the forgery and demanded repayment, which was refused: Held, that there was no negligence in the time of the notice and demand.

2. The right of the plaintiff to recover back the money did not depend on the right or ability of the defendant to recover from the forger.

3. The act of April 5th, 1849, is not merely declaratory of the law as it then stood; it gives a clear right to the plaintiff to recover the money paid by him to a previous holder.

4. The clearing house rules required that notice as to paper specified should be given within a certain time; forged paper was not amongst the specified. In an action to recover the amount of forged paper paid by the plaintiff to the defendant, the rules of the clearing house were not evidence for defendant.

5. All the facts in this case not sufficient to go to the jury on the question

of negligence: Corn Exchange, etc., *v.* National, etc., 78 Penn. St. R., 233.

A bank is bound to know whether its own bills are genuine or not, and if it redeem its own counterfeit bills it cannot recover of the person to whom the payment was made: U. S. Bank *v.* Bank of Georgia, 10 Wheat., 333; Gloucester *v.* Salem Bank, 17 Mass., 33.

But see Cooke *v.* U. S., 91 U. S. Rep., 389; 12 Blatchford, 43, 53, as to the United States government.

If the treasurer of a state pay interest on bonds, under a forged power of attorney, to the wrong person, he may be compelled, by mandamus, to pay it to the true owner of the bonds: People *v.* Smith, 43 Ills., 219.

A depositor owes the bank no duty which requires him to examine his vouchers with a view to the detection of forgeries of his name: Weisser *v.* Denison, 10 N. Y., 68.

The drawee of a bill of exchange, by accepting and paying it, only vouches for the genuineness of the signature of the drawer, not of the body of the instrument; the holder claiming to be entitled to receive the amount thereof is held to a knowledge of his own title, and of the genuineness of every part of the bill save the signature of the drawer, and the drawee has a right to rely upon the presumptive ownership of the apparent holder: White *v.* Continental, etc., 64 N. Y., 316.

See Security, etc., *v.* Nat., etc., 67 N. Y., 458.

A bank is not bound to know the handwriting or the genuineness of the filling up of a check drawn upon and paid by it. It is legally concluded only as to the signature of the drawer and its own certification.

Where, therefore, a bank has paid by mistake to a *bona fide* holder a certified check which, after certification, had been fraudulently altered by raising the amount, it can recover back the sum thus paid, unless such holder has suffered loss in consequence of the mistake.

Where there is an alteration in the body of an instrument, the recognition of the altered instrument as genuine is only binding upon a party who made the body of the instrument, as well as the signature thereto.

A mistake in recognizing a forged instrument as genuine, is binding only when the forgery is such that it ought to have been detected by a bare inspection of the instrument, without reference to anything outside of it, not even to the memory of the party as to the obligations he has issued: National, etc., *v.* National, etc., 55 N. Y., 211.

See Security, etc., *v.* Nat., etc., 67 N. Y., 458.

A person indorsed a negotiable promissory note for $500, for the maker's accommodation. The maker then, by the use of chemicals, rendered the amount of the note invisible, wrote in a larger amount, and procured the note to be discounted at a bank as a note for the larger amount. Before the note became due the fraud was discovered, the original writing was restored. When the note became due it was duly protested, and an action brought against the indorser, as on a note for the original amount: Held, that the indorser was not liable: Citizens', etc., *v.* Richmond, 121 Mass., 110.

Plaintiffs on the 17th of April accepted and paid to defendant a bill drawn upon them, which before acceptance had been altered by raising the amount. The bill had been deposited with the defendant, and the amount credited to the depositor; the forgery was not discovered till October 5th. In an action to recover back the money paid, held, that as defendant, in dealing with the bill or its avails, did not act upon the faith of any admission of plaintiffs, expressed or implied, as to the genuineness of the body of the instrument, or of any act or declaration on their part, but upon the apparent title and genuineness, and the responsibility of those from and through whom it received the bill, plaintiffs owed no duty to it in respect to the forgery; and that no negligence on their part could defeat their right of recovery. Also held, that regarding the case as one of mutual mistake, in respect to which neither party was in fault, plaintiffs were entitled to recover: White *v.* Continental, etc., 64 N. Y., 316, distinguishing National, etc., *v.* National, etc., 50 N. Y., 575; City Bank *v.* National Bank, 45 Texas, 203; Canal Bank *v.* Bank of Albany, 1 Hill, 287.

A bank may recover from one to whom it has paid a check with a forged

indorsement of the name of the payee the amount paid thereon: Canal Bank *v.* Bank, 1 Hill, 287; Morgan *v.* Bank, 11 N. Y., 404; Graves *v.* American, etc., 17 N. Y., 205; Turnbull *v.* Bowyer, 2 Rob., 411; 40 N. Y., 456; Third, etc., *v.* Allen, 59 Missouri, 310.

A bank paying a check upon a forged indorsement of the payee is not chargeable with negligence in not discovering the forgery, but when discovered it must, *within a reasonable time* under all the circumstances, notify the person to whom the payment is made: Third, etc., *v.* Allen, 59 Missouri, 310; Espy *v.* Bank, 18 Wall., 604; Canal Bank *v.* Bank, 1 Hill, 287; Bank Commerce *v.* Union, etc., 3 N. Y., 230; Cooke *v.* U. S., 91 U. S. Rep., 389; Koontz *v.* Cent., etc., 51 Missouri, 275; Kenny *v.* First Nat., etc., 50 Barb., 112; Burrill *v.* Watertown, 51 Barb., 105; Rich *v.* Kelly, 30 Penn. St. R., 527; Union, etc., *v.* Baldenwick, 45 Ills., 376; Wingate *v.* Neidlinger, 50 Ind., 520.

See Weisser *v.* Denison, 10 N. Y., 68.

Whether the party must offer to return the forged paper: Burrill *v.* Watertown, etc., 51 Barb., 106, questioning Thomas *v.* Todd, 6 Hill, 340; Rick *v.* Kelly, 30 Penn. St. R., 527.

Some cases hold that the party must use due diligence in discovering the forgery, and must discover that within a reasonable time: Alvord *v.* Cornwall, 28 Mich., 336; Wingate *v.* Neidlinger, 50 Ind., 520; Samuels *v.* King, 50 Ind., 527; Lawrenceburgh, etc., *v.* Stevenson, 51 Ind., 594.

So as to payment in bills of a bank which has failed: Rogers *v.* Langford, 1 Cromp. & Mees., 637; 3 Tyrwh., 654.

R., while living in Texas, assumed the name of G., a former acquaintance, and under that name received a letter addressed to G. containing a check drawn by the defendants to the order of G.; R. forged the indorsement of G. and received the amount of the check from W., who indorsed it to the plaintiff. Before the presentation of the check the fraud was discovered, and the defendants stopped payment of the check. Both W. and the plaintiff had received the check in good faith and for value: Held, that the defendants were not liable upon the check; first, because the plaintiff acquired no title through the forgery; second, because the defendants remained liable upon the check to the real payee: Held, also, that the fact that R. had a short time before obtained by the same criminal process a check of fifty dollars upon which he had forged the indorsement and obtained the money therefor from W., and that such check on reaching New York had been paid, did not alter the case, because no knowledge of the fraud or forgery in the first check, and its negotiation, had been brought home to the defendants or the relatives of G. before sending the check in suit, and because the act of payment by the drawees of the first check upon a forged indorsement, which may have influenced W. in relying upon the subsequent indorsement, was not the act of the defendants, and did not estop them or G. from asserting the forgery, upon which the money on that check had been obtained from the drawers: Palon *v.* Watt, 7 Hun, 317.

See Graves *v.* Am. Ex. Bank, 17 N. Y., 205.

1. An Indiana bank drew on a Philadelphia bank in favor of the cashier of a New York bank; the draft was stolen, the name of the cashier (payee) forged as indorser and passed to defendants, October 16th, in payment of goods sold to the holder, they giving to him a check on the Philadelphia bank for the difference which was drawn, and the draft indorsed by the defendants was deposited to their credit in the same bank. After learning of the fraud on Nov. 2d, the bank demanded payment of the draft from defendants: Held, that the demand was in time.

2. Under act of April 5th, 1849, the amount of the draft could be recovered back from the defendants.

3. The holder of a draft which is indorsed and passed by him, guaranties the prior indorsements: Chambers *v.* Union, etc., 78 Penn. St. R., 205.

If a depositor in a bank draw a check to the order of A., and the bank pay it on a forged indorsement of the name of A., it is no payment as against the depositor, and the bank is liable to him for the money: Morgan *v.* State Bank, 11 N. Y., 404; Turnbull *v.* Bowyer, 2 Rob., 411; Dodge *v.* National, etc., 20 Ohio St. Rep., 234; Gissing *v.* Hopper, 6 U. C. K. B. (O.S.), 505.

So the payee named in the check may

ratify its giving to him, and it seems recover against the bank, under such circumstances :- Dodge *v.* National, etc., 20 Ohio St. R., 234; Gissing *v.* Hopper, 6 U. C. K. B. (O.S.), 505.

The payee of a check before it is accepted by the drawee cannot maintain an action upon it against the latter, as there is no privity of contract between them. So held, where a check of the treasurer of the United States upon a national bank duly designated as a depositary of the public money, having been paid upon an unauthorized indorsement of the name of the payee, suit was brought by its true owner against the bank.

The rights of the parties are not changed by the fact that, on a settlement of accounts between the treasurer and the bank, the check, on the supposition that it had been properly paid, was credited to the bank. Such an error does not affect the real state of the accounts, when it is discovered they are open to correction. Payment to a stranger upon an unauthorized indorsement does not operate as an acceptance of the check, so as to authorize an action by the real owner to recover its amount as upon an accepted check: First, etc., *v.* Whitman, 94 U. S. Rep., 343; S. P., Matter of Continental, etc., 5 N. Y. Weekl. Dig., 461.

But see Polen *v.* Watt, 7 Hun, 317.

A tax collector may recover from a constable, his deputy, an amount collected by the deputy in a counterfeit note, and paid over to the collector. He may treat the payment of the taxes to the extent of the counterfeit bill as a nullity, and proceed by proper process to the payment thereof from the taxpayer, or he may look to his deputy under his contract or agreement to collect the same: Bex *v.* McKelvey, 8 Heisk. (Tenn.), 561.

Where one holding securities in pledge for a loan, in pursuance of a sale thereof made by the *owner*, delivers the same to the purchaser, receives the purchase price, and, after deducting the amount of the loan, pays over the residue to the owner, this is not an affirmation by the pledgee of the genuineness of the securities, and, in the absence of fraud, an action cannot be sustained against him by the purchaser to recover back the purchase price in case the securities prove to be forgeries: Baker *v.* Arnot, 67 N. Y., 448.

The rule that an agent in order to shield himself from liability must disclose his agency, is applicable to an express company, and is unaffected by the fact that it is the general business of such company to act as agents for others.

The drawee of a draft is supposed to know the signature of the drawer, but the same knowledge of the signature of an indorser is not imputable to him, and by acceptance and payment he does not admit or guaranty the genuineness of the signature of the payee.

A draft drawn upon plaintiffs was fraudulently taken from the post office, the indorsement of the payee forged thereon, and the same was intrusted to defendant's company for collection, and was paid by plaintiffs upon presentation. It was not disclosed to them at the time that the express company was acting as agent. In an action to recover back the money paid, held, that the company was liable: Holt *v.* Ross, 54 N. Y., 472, affirming 59 Barb., 554.

The rule is the same as to a bank which collects a note as agent: Canal Bank *v.* Bank of Albany, 1 Hill, 287.

A bank is liable to a *bona fide* holder in the ordinary course of business upon a forged check, purporting to be drawn upon it, payable to order, and which it has certified. The liability to such holder attaches upon the certification, and it is immaterial whether the indorsement of the check is that of the payee named, or whether a fictitious person is named as payee: Hagen *v.* The Bowery, etc., 6 Lansing, 490, 64 Barb., 198.

See Security, etc., *v.* National, etc., 67 N. Y., 458, as to raised check.

For a novel case, where a party procured paper after assuming false name and when makers held liable to a *bona fide* holder of the paper, see Foster *v.* Heidelbach, 21 Ohio St. R., 474.

A bank, by certifying a check in the usual form, simply certifies to the genuineness of the signature of the drawer, and that he has funds sufficient to meet it, and engages that those funds will not be withdrawn from the bank by him · it does not warrant the gen-

uineness of the body of the check as to payee or amount.

Accordingly held, where plaintiff certified a check which had been altered, by changing the date, name of payee, and raising the amount, and subsequently paid the same to defendant, that the amount could be recovered back as for money paid by mistake.

The authorities as to the effect of acceptance of altered bills of exchange and certification of altered checks collated in opinion of Allen, J.: Marine National *v.* National City, etc., 59 N. Y., 68, reversing 36 N. Y. Superior Court Rep., 478.

See Security, etc., *v.* National, etc., 67 N. Y., 458.

The fact of payment by the bank of the amount of a check drawn by the depositor to the order of a payee, to a person other than such payee, on the forged indorsement on the check of the name of such payee, does not constitute a defence.

1. It is not a payment to the written order of the depositor.

2. This, unmixed with the element of inducement by or through the depositor to pay on the forgery, constitutes no defence.

A depositor signing checks for amounts not due to the payee, trusting, without making a personal examination, to his clerk's statement that such amounts were due, and after signing, handing them to the clerk, will not.

Non-discovery of the forgery of the indorsements upon checks drawn by a depositor to order of a payee, which checks had been honored by the depository and returned to the depositor with his pass-books where he was charged with the amounts thereof, for a length of time after such return, say two years, *and the not making any claim* against the depository until after such discovery, is not a ratification of the payments made on such forged indorsements: Welsh *v.* German, etc., 42 N. Y. Superior Court Rep., 462.

Where a forged certification of a check is presented at the bank upon which the check is drawn, to the teller whose certificate it purports to be, and he pronounces it genuine, he adopts the certification and the bank is bound by it, in favor of one who takes it or who may have been prevented from acting to detect the forgery on the strength thereof, the same as if it was genuine: Continental Nat. Bank *v.* Nat. Bank Commonwealth, 50 N. Y., 575; Caso Bank *v.* Keene, 53 Maine, 103; Knights *v.* Wiffin, L. R., 5 Q. B., 660.

See Security, etc., *v.* National, etc., 67 N. Y., 458.

The arrest and detention of a swindler are powerful means in coercing restoration of property he has unlawfully obtained, and the loss of these means in consequence of a reliance upon the declarations of another estops that other from denying the truth of the declarations: Continental, etc., *v.* National, etc., 50 N. Y., 576.

See Security, etc., *v.* Nat., etc., 67 N. Y., 458.

C. & Co. delivered to R. certain gold checks and certificates, receiving therefor R.'s check upon plaintiff's bank, purporting to be certified by its teller. C. & Co. immediately sent a messenger with the check to plaintiff's bank, who handed it to the teller, asking if it was all right. The teller replied that it was. The messenger immediately returned and reported this to C. & Co. The certification was in fact forged. Relying upon the declaration of the teller, C. & Co. refrained from taking such measures as might and probably would have stopped the payment of the gold checks, or a portion of them. C. & Co. deposited the checks with defendant. Plaintiff brought suit to recover back the money paid thereon. Upon the trial the judge, after charging, in substance, that if C. (one of the firm of C. & Co.) had done all that could be done on his part at the time of making the declaration, and had put himself in such a position that the declaration could not affect his action, then the principle of estoppel would not apply, charged as follows: "The delivery of these gold checks on the part of Mr. C., it is insisted upon, is in law a delivery of the gold. I think it was not: Held, that although the charge, if construed as a statement of law applicable to all cases, might be technically inaccurate, yet, as used, it simply conveyed the idea that there was not such a delivery as prevented the interception of the checks and stoppage of payment, and so considered it

did not mislead the jury and was not error. Also held, that plaintiff was estopped by the declaration of its teller from questioning the certification: Continental, etc., *v.* National, etc., 50 N. Y., 575.

See Security, etc., *v.* National, etc., 67 N. Y., 458.

A certified check on a bank is an instrument which, as an entirety, comes within the statute of forgery; and where evidence, received without objection, shows that any material part of it was forged, e.g., the certificate; it is immaterial that the indictment does not specify that the forgery was of the certification, and not of the check itself: People *v.* Clements, 26 N. Y., 193.

Where a note is signed in blank, with marginal figures indicating the amount for which it is to be filled up, and the party to whom it is intrusted for filling up and negotiation, alters the figures, and fills up and negotiates the note for a larger amount, this is no forgery of the note, and the simple fact of alteration does not of itself, and necessarily, vitiate the note, although the party so signing in blank was surety, and known to the payee to have signed it as such: Schryver *v.* Hawkes, 22 Ohio St. R., 308.

Where a corporation transfers stock on a forged assignment or power of attorney a suit in equity will lie by the owner of the stock to compel a retransfer of the stock and to give new certificates thereof: Midland *v.* Taylor, etc., 8 H. L., 751; Ang. & Ames' Corp., §§ 482–5; Sewall *v.* Boston, etc., 4 Allen, 277.

See Donaldson *v.* Gillott, L. R., 3 Eq., 274; Swan *v.* North, etc., 2 Hurl. & Colt., 175; Id., 7 Hurl. & Norman, 603; Brown *v.* Howard, etc., 42 Md., 384.

If it has no shares which it can issue it may be compelled to pay him the value thereof: Pollock *v.* Nat. Bank, 7 N. Y., 274; Cohen *v.* Gwinn, 4 Md. Chy. Dec., 357.

A *bona fide* purchaser of the new shares issued on such forged transfer could however obtain good title thereto: Matter Bahai, etc., L. R., 3 Q. B., 584; Hart *v.* Frontino, etc., L. R., 5 Exch., 111.

There being two persons of the same name, and one having received, through a mistake, a certificate of stock intended for and belonging to the other, and having transferred and sold the same as his own, held he was liable for the fraud to *any* person injured thereby although not the *immediate* party to whom the stock was transferred: Faris *v.* Peck, 2 Sweeney, 689; Thomas *v.* Winchester, 6 N. Y., 397.

Where a plaintiff by his own negligence furnishes a third person with the means of perpetrating a wrongful act, whereby the plaintiff incurs a loss, he cannot recover, even though the exercise of due diligence and proper care on the part of the defendant might have prevented the occurrence of the loss. A corporation is not justified in transferring stock on its books upon a blank power of attorney, signed by the owner many years previously (in this case thirteen), without making due inquiry as to whether the power has been revoked. But where, in such case, the owner of stock had intrusted the certificates, with blank powers of attorney to transfer the same to an agent for safe keeping, by whose fraudulent transfers the loss was incurred, the plaintiff cannot recover from the corporation. The rule of law which declares a corporation to be the trustee of its stockholders throws on the corporation the *onus* of proving due diligence in its dealings with the property of the stockholders: Penn. R. R. Co.'s Appeal, 5 Notes Cases, 22.

If a corporation issue stock on forged assignments of the certificate, the person who presents such forged assignments and to whom the new stock is issued may be compelled, in a suit by the owner of the stock against the corporation and such person, to surrender the new stock and the corporation compelled to issue a new certificate to the real owner: Brown *v.* Howard, etc., 42 Md., 384.

It is no defence to an indorser of a note that the name of a prior indorser was forged: Eastwood *v.* Westley, 6 Upper Can. Q. B. (O.S.), 55, disaffirming dictum in East, etc., *v.* Tritton, 5 Dowl. & Ry., 214; Lambert *v.* Oakes, 1 Ld. Ray., 443; Critchlow *v.* Parry, 2 Camp., 182.

An indorser warrants the genuineness of the signature of all prior par-

ties: Turnbull *v.* Bowyer, 40 N. Y., 456.

The general rule that an indorser of a promissory note contracts that the instrument itself and the antecedent signatures are genuine, does not apply where the holder has procured an indorsement upon a forged note with knowledge of the forgery, and upon a representation to the indorser that it was genuine, or where the holder received the note after maturity and without consideration from one who so procured the indorsement: Turner *v.* Keller, 66 N. Y., 66; Ellis *v.* Ohio Life, etc., 1 Handy, 97, affirmed, Id., 119.

One of two partners drew in the name of his firm a bill upon the plaintiff, payable to the order of B., and having forged the name of B. as indorser upon the bill, presented it to the Bank of Central New York, had it discounted in the regular course of business, and applied the proceeds to his private use. The cashier of the bank indorsed the bill and transmitted it to the defendants for collection, and the plaintiff accepted and paid it to the defendants. After discovering that the payee's indorsement was forged, he sued to recover back the money so paid: Held, that the action could not be maintained.

B., the payee, being a stranger to the transaction, and having no interest in the draft, his indorsement was not necessary in order to transfer a good title to the party discounting the paper, or to entitle such party to receive the money upon it.

The plaintiff having accepted and paid the bill under these circumstances, would have a right to charge the amount against the funds of the drawers in his hands, or, if there were none, to maintain an action against them for money paid to their use.

The case of the Canal Bank *v.* The Bank of Albany (1 Hill, 287), commented upon and approved; but distinguished from this case, inasmuch as there the indorser, whose name was forged, was the *owner* of the draft, and the only person entitled to receive the money upon it. Per Bronson, J.

It seems that the drawers after having passed the draft with the payee's name indorsed upon it, and received the avails of it in an action against them, would be estopped from controverting the genuineness of the indorsement.

Where a bill is put in circulation by the *drawer* with the indorsement of the payee forged upon it, a *bona fide* holder may treat it as a bill payable to bearer. Per Bronson, J.: Coggill *v.* American, etc., 1 N. Y. Rep., 113.

The acceptance, in good faith, from the maker, who is insolvent, of a note with a forged indorsement of the name of the payee, in discharge and payment of a note executed by the same maker, with the genuine indorsement of the same payee, known to the holder as an accommodation indorser, will not discharge such indorser on the original note: Allen *v.* Sharpe, 37 Ind., 67; Ritter *v.* Singmaster, 73 Penn. St. R., 400.

The forgery of the names of the payees of a check, on the faith of whose genuineness the holder will be presumed to have taken the check, dispenses with notice of its non-payment: Turnbull *v.* Bowyer, 2 Rob., 406; 40 N. Y., 456.

One who loans his own checks to another cannot hold the bank to which they are passed or paying them for the amount thereof, on the ground that he was induced to loan the checks on forged securities: Justh *v.* National, etc., 36 N. Y. Superior Court Rep., 273.

[1 Common Pleas Division, 591.]

May 3, 1876.

591] *CREEN v. WRIGHT.

Master and Servant—Contract of Hiring—Wrongful Dismissal.

The plaintiff, a master mariner, accepted the command of the defendant's ship under a written agreement, as follows: "I hereby accept the command of the ship City Camp on the following terms: Salary to be at and after the rate of £180 sterling per annum." "Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the command, and the owners have the option of paying or not paying his expenses travelling home." "Wages to begin when captain joins the ship":

Held, that the plaintiff could not (except under unusual circumstances) be dismissed without a reasonable notice.

ACTION for alleged wrongful dismissal of the plaintiff. At the trial before Lush, J., at the Liverpool Assizes, 1875, it appeared that the plaintiff was, by a contract in writing dated the 28th of March, 1875, engaged by the defendant as master of the ship City Camp. The contract contained the following (amongst other) provisions: "Salary to be at the rate of £180 per annum." "Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the command, and the owners have the option of paying or not paying his expenses travelling home." "Wages to begin when captain joins the ship."

The plaintiff, in pursuance of this agreement, took the command of the ship. Arrived at Liverpool, the homeward cargo was discharged and a portion of a return cargo loaded, when, on the 10th of August, 1875, the defendant, without notice, and without any justifiable cause, discharged the plaintiff, insisting that by the terms of the contract he was not entitled to any notice.

The learned judge ruled that, the contract being specific, in the absence of any evidence of custom, as in the case of clerks and servants, the plaintiff was not entitled to any notice.

Jan. 12. *Herschell*, Q.C., in the last Hilary sittings, obtained an order *nisi* for a new trial, on the ground of misdirection.

May 3. *T. H. James* showed cause: By the express terms of the contract the owner had a right to dismiss the captain *abroad* at any time. The hiring was for an indefinite time, and was determinable at any time, at all
592] events before the commencement of *a voyage. In Smith's Master and Servant, 3d ed., p. 76, it is said: "In cases to which the custom applicable to domestic servants does not apply, and in which no specific agreement has been

made as to the notice to be given for the purpose of determining the contract, the question must be determined by the custom applicable to the particular trade or calling with reference to which the service is to be rendered." Here there is no custom. In *Hiscox* v. *Batchelor* (1), where a written agreement to employ a person as an advertising agent contained no provision as to the notice which should determine the agreement, Byles, J., said that the notice must be a reasonable one; and, a month's notice having been given, the jury found for the defendant. So, in *Foxall* v. *International Land Credit Co.* (2), it was left by the same learned judge to the jury to say what was a reasonable notice in the case of a clerk. In the present case, the hiring was not an ordinary hiring for a year. The defendant had clearly a right to dismiss the plaintiff before the commencement of the new voyage.

[LORD COLERIDGE, C.J.: The hiring being indefinite, it is a hiring for a year, in the absence of anything to show the contrary: *Rex* v. *Inhabitants of Hampreston* (3).]

The case of a master of a ship is an exceptional one.

[LORD COLERIDGE, C.J.: Why so?]

It would be extremely inconvenient if the service were to determine in the middle of a voyage; therefore it cannot be intended to be a service for a year. The parties here have expressly stipulated to exclude notice; by the very terms of the contract the wages are to cease from the day the captain is required to give up the command of the ship.

Herschell, Q.C., in support of the order: The ruling of the learned judge cannot be supported. *Prima facie*, no doubt, an indefinite hiring is a hiring for a year determinable by notice if there be a custom, or, in the absence of custom, by a reasonable notice. If it be determinable without notice by the employer, it must be equally so by the employé. That in a case like this would be so unreasonable that it cannot be presumed to have been *the intention of the parties. [593 It may be that by custom the engagement might have been determinable at the end of the voyage, viz., at Belize. But there was evidence of the continuance of the hiring beyond that period: and that would be for the jury. In *Fairman* v. *Oakford* (4), Pollock, C.B., says: "There is no inflexible rule that a general hiring is a hiring for a year; each particular case must depend on its own circumstances. From much experience of juries, I have come to the conclusion

(1) 15 L. T., 543.
(2) 16 L. T. (N.S.), 637.
(3) 5 T. R., 205.
(4) 5 H. & N., 635, 636; 29 L. J. (Ex.), 459.

that usually the indefinite hiring of a clerk is not a hiring for a year (absolutely), but rather one determinable by three months' notice." Here the stipulation for a dismissal without notice is expressly confined to a dismissal abroad.

LORD COLERIDGE, C.J.: We entertain a strong opinion in this case: but, as the matter is one of great general importance, and one upon which there is no distinct authority, we will take time to consider.

Cur. adv. vult.

May 10. The judgment of the court (Lord Coleridge, C.J., and Archibald and Lindley, JJ.) was delivered by

LORD COLERIDGE, C.J.: This was an action tried before my Brother Lush at Liverpool in December, 1875, in which he directed a verdict to be entered for the defendant; and we have to determine whether that direction was correct.

The plaintiff had been the master of the ship City Camp, under a written contract dated the 28th of March, 1875, from that day until the 10th of August, 1875, when he was dismissed, not for misconduct, but without notice, the defendant contending that, by the terms of the contract between the plaintiff and himself, the plaintiff was not entitled to any notice before dismissal. Other points arose in the case, but were not discussed before us.

The action was brought for a dismissal wrongful in being without notice; and the sole question argued was, whether, under the contract, the plaintiff was entitled to notice before dismissal, and on this single point my Brother Lush directed the verdict for the defendant.

594] *The contract, so far as it is material to set it out, was as follows:—

"I hereby accept the command of the ship City Camp on the following terms: Salary to be at and after the rate of £180 sterling per annum." Then followed certain other terms not material, and then,—"Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the command, and the owners have the option of paying or not paying his expenses travelling home. . . . Wages to begin when captain joins the ship.

"Francis Creen, Master, City Camp."

It was contended for the plaintiff that, under this contract, he was entitled to a reasonable notice before dismissal, at any rate if dismissed in this country; and my Brother Lush held that he was not: but, upon consideration, we are of opinion that he was.

The relation of the master of a ship to this employer, the shipowner, is not one in which, in the case of an indefinite hiring, the law has made, and there was no evidence of any custom making, the hiring a hiring for a year or for any other definite time, nor the notice by which the service is to be determined certain. As to the hiring, we adopt the language of Pollock, C.B., in delivering the judgment of the court in *Fairman* v. *Oakford* (1): "There is no inflexible rule that an indefinite hiring is a hiring for a year. Each particular case must depend upon its own circumstances." As to the notice, we think the sound construction of the contract before us is, that, except in the single case provided for by its terms, there must be a reasonable notice before it can be put an end to by either party. The rule of construction must be the same for both parties to the contract. If the shipowner may dismiss the master without notice on the very eve of a voyage, the master may leave the ship without notice at the same point of time. But the great inconvenience and heavy loss which might be, and indeed in most cases would be, inflicted on the shipowner, without any remedy, by such a construction of the contract if acted on by the master, lead us to believe that such is not and could not be the meaning of the contract nor the intention of the parties to it. The loss *and [590 inconvenience to the master following upon the construction contended for, though not positively so great, may be relatively very great indeed: and this consideration points to the same conclusion. The provision that the master's wages shall cease instantly upon dismissal abroad, may well have been intended to prevent any question as to the shipowner being liable to the whole expense of bringing the master back to the United Kingdom; and does not appear to us to permit an argument for construing the contract so as to enable either party to put an end to it at any time without notice of any kind. Indeed, upon the construction of the contract contended for by the plaintiff, and if no notice before putting an end to it was required at any time on the part of either master or shipowner, it is not easy to assign a reason for the insertion of this particular provision into the contract. Nor was any satisfactory reason offered to us why the rule "*Expressio unius est exclusio alterius*" should not apply to it.

We think, therefore, that, under his contract, as the master could not, except under very unusual circumstances, be dismissed during the continuance of a voyage and while

(1) 5 H. & N., 635; 29 L. J. (Ex.), 459.

the vessel was at sea, so he was entitled to some notice, and that is to reasonable notice, before dismissal in this country.

There is some authority for saying that, as a proposition of general law, reasonable notice is to be implied as a term of such a contract of hiring as this. Sir John Byles so laid down the law at *nisi prius* in the case of *Hiscox* v. *Batchelor* (1); and the case of *Fairman* v. *Oakford* (2), already referred to, seems, if the facts of it be carefully considered, to be an authority to the same effect. For, in the absence of stipulation for any notice, a month's notice was held reasonable to determine an indefinite hiring of a clerk, on the ground that the same clerk had accepted such a notice as sufficient to determine a former indefinite hiring also without stipulation for notice of any kind. It is nowhere suggested that the absence of stipulation made no notice necessary in either of the hirings, which would have been a short and simple ground, if a sound one, for upholding the verdict in that case.

But, without intending to throw any doubt whatever upon these cases, we decide the one before us upon its own
591] circumstances, *and upon considerations especially applicable to the contract on which the dispute arose. And we think that the order must be absolute for a new trial.

Order absolute.

Solicitors for plaintiff: *Evans & Lockett*, Liverpool.

Solicitors for defendant: *Gregory, Rowcliffes & Co.*, for Hull, Stone & Fletcher, Liverpool.

(1) 15 L. T., 543. (2) 5 H. & N., 635; 29 L. J. (Ex.), 459.

This case seems to have proceeded partly upon principles applicable to contracts between owner and captain of vessels, partly upon the law of England requiring notice of the termination of an indefinite hiring by the party terminating it, and partly upon the ground that where the right to discharge in a particular case is expressly contracted for, by implication it precludes the idea of a right to do so, except in the usual manner under any other circumstances.

See as to the first ground: Jenkins v. Wheeler, 4 Robertson, 450; 2 Abb. Appeal Cases, 442; 3 Keyes, 645; 4 Trans. App., 450.

The plaintiff hired of the defendant a room with steam power, at a monthly rent, it being agreed that he should have the power "as long as the defendant saw fit to let him have it." In an action for taking away the power; held, that the plaintiff was not entitled to a month's notice, the notice required by statute to terminate a tenancy of real estate at will before its discontinuance: Shorey v. Farrell, 114 Mass., 441.

In this case, however, the court said "the plaintiff admitted that he had reasonable notice of the termination of this agreement."

If one orders goods, agreeing to pay if satisfied therewith, he must, in ascertaining whether he is satisfied or not act honestly, and in accordance with the reasonable expectations of the seller, as implied from the contract, its subject matter and surrounding circumstances. His dissatisfaction, to be available as a defence to an action for the contract

price, must be real and not pretended: Daggett *v.* Johnson, 49 Verm., 345.

If a servant hire for a definite period, with the privilege of leaving if *dissatisfied*, and quit before the expiration of the time without claiming to be dissatisfied, but on the ground that he has other business to attend to, he is not entitled to recover for what he has done: Monell *v.* Burns, 4 Denio, 121.

Otherwise if there be a *bona fide* disagreement: Gates *v.* Davenport, 29 Barb., 160.

See also Hart *v.* Hart, 22 Barb., 606; Wellerwulgh *v.* Knickerbocker, etc., 2 Bosw., 381.

If the agreement be that either party, if dissatisfied, may put an end to the contract, either may do so without informing the other of the grounds of dissatisfaction, and without in fact having any adequate reason for such dissatisfaction: Rosseter *v.* Cooper, 23 Verm., 522.

One who hires another, if he fills the place satisfactorily, may terminate the agreement whenever, in his judgment, he does not meet its requirements: Tyler *v.* Ames, 6 Lansing, 280.

The plaintiff promised to make the defendant a satisfactory suit of clothes; the defendant returned the suit as unsatisfactory: Held, that an action for the price could not be maintained, as defendant had by the terms of the contract a right to return the clothes from mere caprice: Brown *v.* Foster, 113 Mass., 136; McCarren *v.* McNulty, 7 Gray, 139.

A clause in a chattel mortgage, providing that if the mortgagee shall at any time deem himself insecure, he may take possession of and sell the property, vests in him an absolute discretion; and this right does not depend upon his having *reasonable ground* for deeming himself insecure: Huebner *v.* Koebe, 42 Wisc., 319.

Where a servant agrees to work one month, and, if satisfied, six months, he is bound to determine at the end of the month whether he will work the six months, and if he remain and work, after the expiration of the first month, he elects to work the six and cannot recover if he leaves the master's employment without justifiable cause: Peters *v.* Whitney, 23 Barb., 24.

Where a printing press was sold, giving the purchaser 30 days after it was set up in running order to determine whether he would keep and pay for it, the seller agreeing to keep it in permanent order, it was held, that if the purchaser kept the same after 30 days, without notice of his election not to keep the same, he was responsible for the price, notwithstanding he made objections within that time, and had the seller make repairs, as that would be referred to the seller's duty to keep it in repair: Prairie, etc., *v.* Taylor, 69 Ills., 440.

The plaintiff entered into an agreement with the defendants, by which he agreed to ship and deliver to the defendants a force pump, of the value and for the price of $60, promising that if the defendants could not make it operate he would make it work, so as to throw water all over the mills of the defendants, or that he would take it away again; the defendants agreeing that if the plaintiff would send them such a pump, on trial, they would try it, at their earliest convenience, or when they could, after which if they liked it they would try it and pay the plaintiff $60 for it: Held, that this was not a sale of the pump, but a conditional agreement by the defendants to purchase it at a future time.

Held, also, that the defendants were bound to try the pump within a reasonable time; and that they having kept the same in their possession for nearly two years, without making any trial of its sufficiency, or showing any valid excuse for the neglect, the plaintiff was at liberty to treat the condition annexed to the contract as waived, and was entitled to recover the stipulated price of the pump.

Held, further, that a trial or experiment of the identical pump was what the agreement required, and no other test was admissible. Hence the opinions of mechanics and experts, who, after examining the pump, had pronounced it insufficient to accomplish the purpose for which it was designed, furnished no excuse to the defendants for omitting to make a trial of the pump: McDonald *v.* Pierson, 38 Barb., 128.

See also Boothby *v.* Scales, 27 Wisc., 626.

As part of the consideration for the

price paid for a machine, the seller of it agreed with the buyer, that if on a fair trial by the buyer it should not "prove to be suited for the purpose" for which he bought it and "entirely satisfactory in all respects to him," he might return it, and the seller, on receiving it, would pay back the price. The machine, on a fair trial by the buyer, "failed to answer the purpose for which he bought it," and proved unsatisfactory to him; and he returned it without first giving the seller notice of any difficulty, or opportunity to remedy it, and sued him for the price, after demanding and being refused repayment thereof: Held, that the buyer was not bound to give any such notice or opportunity; and that it was immaterial that the machine after its return to the seller worked well, under his management, without alteration or repairs: Aikin *v.* Hyde, 99 Mass., 183.

Under a contract between the plaintiff and the defendant, by the terms of which the defendant was to take a patent sugar evaporator of the plaintiff upon trial and pay for it if he liked it, the plaintiff to take it back if he did not like it; held, that in arriving at a determination whether to keep the article or not, the defendant was bound to bring to the trial of it honesty of purpose and judgment according to his capacity, to ascertain his wishes, and was not necessarily bound to use the care and skill of ordinary persons in making the determination: Hartford, etc., *v.* Brush, 43 Verm., 528.

On a sale, with the privilege of reassigning after a trial of the article, the acceptance of the reassignment is a waiver of the trial. So if, after the sale, the vendor promise to furnish the vendee with the means for a trial, the promise, though without consideration, is an answer to the want of trial: Young *v.* Hunter, 6 N. Y., 203.

Where, by the terms of a warranty under which a reaping machine was sold, it was stipulated that, in case it failed to work as warranted, it was to be returned to the purchaser at a certain place, it was held, that a notification by the seller to the buyer that he would not receive the machine back, excused the buyer from making any effort to return it: Padden *v.* Marsh, 34 Iowa, 522.

A contract for the sale of a reaping machine set out a warranty upon express conditions, among which was the following: that if it failed to work as represented, the vendee should "give immediate notice to our agent of whom it was bought, or to us at Dayton, and to again try the machine in his presence or ours, and if it still fails in fulfilling the above warranty, he agrees to return the machine to our agent, at the place named in the order or to us at Dayton: Held, that a request by the agent (admitted to have been made without authority from his principals), that the vendee would retain the possession of the machine, did not operate as a waiver of the condition requiring a return to the place where the order was made: Bomberger *v.* Griener, 18 Iowa, 477.

See this case distinguished in Austman *v.* Theirer, 34 Iowa, 272.

See also Gammer *v.* Borgain, 27 Iowa, 369, as explained in McCormick *v.* Danville, 36 Iowa, 145; Speckler *v.* Marsh, 36 Md., 222.

Assumpsit for goods (a machine) sold and delivered: Held, that the defendant might show, under the general issue, that the machine was manufactured by the plaintiff for the defendant, under a condition that if it did not work, nothing should be paid for it; that it could not be made to work, and that it was useless to the defendant: Held, also, that although the machine was not proved to have been returned to the plaintiff, he was not entitled to any damages on the *quantum valebat*, without showing some new implied contract arising from the defendant's dealing with the goods: Groundsell *v.* Lamb, 1 Mees. & Welsb., 352; Cousins *v.* Paddon, 2 Cromp., Mees. & Rosc., 547, 5 Tyrwh., 535.

Defendant having given a written order for a harvester for which he proposed on delivery to give his note for two hundred dollars, and to pay the same in case the machine was answerable to the warranty contained in the order, and to redeliver the machine if it was not, and the warranty clause contemplating the actual trial of the machine in the harvest field, and the machine having been delivered without the note being given or required, and having been tested by defendant and found unsatisfactory and plaintiff

notified thereof, it was held, in a suit for damages for refusal to deliver the note, that defendant was not bound to give the note if the machine was found upon trial not to be such a one as he was bound to accept and pay for by the terms of the order: Sherwood *v.* Hecox, 35 Mich., 202.

Where, by the terms of a warranty on the sale of a reaping machine, the buyer was limited to a certain period of use for purposes of trial of the machine, and was to give notice of defects in case it failed to work as warranted; it was held, the buyer having given notice as required, that while his subsequently continuing to use the machine, deprived him of the right of returning it or setting it aside and recovering the amount paid, it did not estop him from reducing the amount of the recovery by the damages sustained by him on account of the defects: Austman *v.* Theirer, 34 Iowa, 272.

See Bamberger *v.* Greiner, 18 Iowa, 477.

Where, on the sale of a machine, the seller warrants that it will operate in a certain manner, and agrees that if it does not he will take it back and return the money, there being no express undertaking that the vendee shall in such case return the machine, the latter may, on breach of the warranty, retain the machine and recover damages sustained by the breach: McCormick *v.* Danville, 36 Iowa, 645.

See also Fairfield *v.* The Madison, etc., 38 Wisc., 347; Prairie, etc., *v.* Taylor, 69 Ills., 440.

Where goods delivered "on sale or return," are not returned within a reasonable time, the sale of the goods becomes absolute, and the price may be recovered under the common counts for goods sold and delivered: Moss *v.* Sweet, 16 C. B., 493, disapproving as to the manner of pleading in such case: Iley *v.* Frankenstein, 8 Scott, N. R., 839, and Lyons *v.* Barnes, 2 Stark. N. P., 39.

To same effect as Moss *v.* Sweet is Speckler *v.* Marsh, 36 Md., 222.

In New Hampshire it has been held that, in such case, a special count founded upon the special contract is necessary: Clay *v.* Bohonon, 54 N. H., 474; Pinkham *v.* Mattox, 53 N. H., 600.

Where the question is whether a machine would perform in a certain manner at a certain place, evidence as to the manner in which it performed at a certain place in another state is competent: Baker *v.* Rickart, 52 Ind., 594.

But see Aikin *v.* Hyde, 99 Mass., 183, *supra*.

So that other machines exactly similar made and sold by the same vendor had, upon trial, been found defective in the same particulars, *when the defence was that representations by the seller, as to the machine, were fraudulent:* Watts, etc. *v.* Smith, 120 Mass., 444.

Otherwise where the defence was *a breach of warranty* that a patent oven should prove of a certain capacity: Vale *v.* Butler, 111 Mass., 55.

On a question as to whether a building was negligently burned by sparks from an engine, evidence as to how far sparks from the same engine had kindled fires is competent: Hinds *v.* Barton, 25 N. Y., 544; Teall *v.* Barton, 40 Barb., 137.

So of other similar engines: Crist *v.* Erie Railway, 58 N. Y., 638; Hinds *v.* Barton, 14 N. Y., 218; Field *v.* N. Y. Cent. R. R., 32 N. Y., 339.

Though it is not proper to prove that a person is usually careless: Jacobs *v.* Duke, 1 E. D. Smith, C. Pl., 271; Perry *v.* Gray, 106 Mass., 206.

See Atwood *v.* Scott, 99 Mass., 177; Hilton *v.* Scarborough, 5 Gray, 422; Baker *v.* Stonetraker, 36 Mo., 338.

So what a person did under other similar circumstances: Murray *v.* Smith, 1 Duer, 432–3; Wilmot *v.* Richardson, 6 Duer, 328, 339; Jackson *v.* Smith, 7 Cowen, 717.

Nor that the party had made other similar contracts: Hollingham *v.* Head, 4 C. B., N.S., 388, 93 Eng. C. L.; 27 L. J., C. Pl., 241, cited Leigh and Cave, 501 note; Plummer *v.* Mold, 22 Minn., 15.

See Stolp *v.* Blair, 68 Ills., 541; Lynn *v.* Kidder, 48 Verm., 42.

[1 Common Pleas Division, 602.]

May 25, 1876.

602] *Burchell v. Clark and Another.

Lease—Discrepancy, as to Duration of Term, between Habendum and Reddendum, and between Lease and Counterpart—Reformation of Deed.

Where there is an irreconcilable discrepancy between a lease and its counterpart, the former must be taken to be correct rather than the latter.

Where the statement of the duration of the term in the habendum differs from that in the reddendum, the statement of the term in the latter will be treated as surplusage, and the former must prevail.

In 1784, a lease was granted, habendum for 94¼ years, reddendum for 91¼ years. The counterpart in both places had it 91¼ years; and there were circumstances (not strictly evidence) which tended to show that the term really intended to be granted was 91¼ years only. In ejectment by the assignee of the reversion against the assignee of the lessee, brought in 1876:

Held, that, the lease being the superior part of the instrument (treating the lease and counterpart as one deed), the statement in the habendum thereof must prevail; and that, as between the parties to the action, there could be no reformation.

Special case. 1. The plaintiff sues as owner in fee of the premises contained in a lease dated the 3d of September, 1784.

603] *2. By that lease the premises mentioned in the statement of claim were demised to Samuel Coney, his executors, administrators, and assigns, "To have and to hold the said premises from the feast of St. John the Baptist last past before the date hereof for and during and unto the full end and term of *ninety-four years and one quarter of a year* from thence next ensuing: Yielding and paying therefor yearly and every year during the said term of *ninety-one years and one quarter of a year* hereby demised unto the said Henry Penton the yearly rent of three pounds."

3. The lease was executed by Henry Penton only.

4. Indorsed upon the lease was a description of its contents, as follows:—

Dated 3d Sept., 1784.

Henry Penton, Esq.,	Lease of a house and premises in the New Road leading from Paddington to Islington.
to	Commencing 24th June, 1784.
	For 94¼ years.
Mr. Samuel Coney.	Rent, £3 per annum, payable quarterly.

5. The 4 in 94 had originally been 1, and the + had been added at some time of which there was no evidence.

6. It was objected that this fact could not be taken into consideration; such objection to be dealt with by the court.

7. The counterpart of the lease, signed by Coney, the

lessee, corresponded in all respects with the lease, except that in the *habendum* the term stated is ninety-one years and one quarter instead of ninety-four years and one-quarter, and the same on the indorsement, if that can be regarded.

8. The house in question is one of a row of seven houses, all of which belonged to the same lessor, and the remaining six of which were demised by indentures of lease dated the 31st of July, 1784; five of the said remaining six houses being demised for the term of 91¼ years from the said feast of St. John the Baptist, and the sixth one from the 29th of September of that year for the term of 91 years, to the same lessee or to others by his direction.

9. This evidence also is objected to, and to be dealt with by the court.

10. The plaintiff claims as owner in fee on the expiration of the lease.

*11. The defendant is executor of one Ann Hill, [604 who had purchased the residue of the term.

12. He defends as landlord, an underlease not yet expired having been granted by her.

The question for the court is, whether the lease of 1784 was one for 94¼ or 91¼ years. If the former, judgment for defendants: if the latter, for plaintiff, as prayed for in statement of claim.

Finlay, for the plaintiff: It is quite obvious that this was intended to be a lease for ninety-one years and a quarter only; and the description in the *habendum* must be treated as a mistake. In the *reddendum* the term is stated to be 91¼ years, and the counterpart everywhere describes it as 91¼ years; the 94 therefore is inconsistent with the *reddendum* and also inconsistent with the counterpart; and the house in question is one of a row, the leases of which were granted at the same time, and all are for 91¼ years only.

[BRETT, J.: Can the court look at the counterpart for the purpose of correcting a supposed blunder in the lease?]

The counterpart is always admitted as evidence of the demise: *Houghton* v. *Kœnig* (1). The consequence of holding this to be a lease for 94¼ years will be that the tenant will occupy for three years without paying any rent. In Leake on Contracts, p. 173, it is said: "Where a mistake in a written contract is so obvious on the face of it as to leave no doubt of the intention of the parties without the assistance of external evidence, the contract is construed according to the obvious intention of the parties. Accordingly, where it

(1) 18 C. B., 235.

was manifest on the face of an instrument that one name had been written by mistake for another, the court read the instrument with the mistake corrected. So, where in a bond the condition was written that it should be void if the obligor did not pay a sum of money, the court recognized the 'not' as inserted by mistake, and read the bond without it: *Wilson* v. *Wilson* (1) and an *Anonymous Case* referred to in the judgment of Lord St. Leonards" (2). In *Spyve* v. *Topham* (3), a lease for a year was made between A. and B.; 605] the release stating B. to be a trustee for *C., granted the premises unto C. in his possession being by virtue of an indenture of lease bearing date the day before the release, and to his heirs, *habendum* to B. and his heirs to such uses as C. should appoint; and it was held that the release was sufficient to convey the premises to B., and that the words in the granting part, "unto C., &c.," might be rejected as surplusage. And see *Strickland* v. *Maxwell* (4); *Morton* v. *Woods* (5).

Graham (*Benjamin*, Q.C., with him), contrà: The fact of other leases having been granted at the same time amounts to nothing. The *habendum* is the proper place to look for the duration of the term. "The *habendum* of a deed is that part of a deed which doth begin with to have and to hold. And this clause doth properly succeed the premises. And the office hereof is to set down again the name of the grantee, the estate that is to be made and limited, or the time that the grantee shall have in the thing granted or demised, and to what use." Shep. Touch., 75.

[BRETT, J.: Reading the lease and counterpart together, it is obvious that the term was intended to be for 91¼ years, and not 94¼ years.]

"If there be any difference between the parts, the counterpart shall be made to agree with the principal, and it [the error] shall be deemed the misprision of the clerk:" Shep. Touch., 53. The lease is the effectual part of the transaction; and is to be construed most strongly against the grantor. In modern leases it is not usual to repeat the duration of the term in the *reddendum* (6).

[BRETT, J.: Are there any cases of applications to courts of equity to reform leases under circumstances such as these?]

The cases of reformation of deeds have always been as between the original parties to them. Here, the defendant

(1) 23 L. J. (Ch.), 697.
(2) 23 L. J. (Ch.), at p. 703.
(3) 3 East, 115.
(4) 2 C. & M., 539.
(5) Law Rep., 4 Q. B., 293.
(6) See the precedents in Bythewood's Conveyancing, 3d ed., by Sweet, pp. 519 et seq.

represents a sub-lessee who has underlet upon the faith of the term being for 94¼ years. The principle upon which equity will grant relief by way of reformation is well stated by the Master of the Rolls in *Garrard* v. *Frankel* (1). The rule of construction has always been that, "if there be two clauses or parts of the deed repugnant the one to the other, the first part shall be received and the latter rejected, *except there be some special reason to the contrary :" [606 Shep. Touch., 88.

[BRETT, J.: Is not the more modern rule this, that all the parts of the deed are to be read together, so as if possible to give a sensible construction to the whole instrument? See Shep. Touch., 87.]

As to the alteration of the indorsement, the presumption would be that it was made at the time of the grant: *Doe* d. *Tatum* v. *Catomore* (2).

[BRETT, J.: If the deed cannot be reformed, the indorsement is of no value.]

Finlay, in reply: *Garrard* v. *Frankel* (1) is clearly distinguishable. The plaintiff here stands in a better position than the defendant; the latter bought under the instrument containing the discrepancy, and took her chance, and made no inquiry; whereas the plaintiff is an assignee of the original lessor, and took without notice that there was anything in the transaction to suggest the necessity for inquiry. If the contention on the part of the defendant is correct, the covenants to insure, &c., will have no operation during the last three years of the term. Less violence will be done to the whole instrument if the plaintiff's construction is adopted than if that of the defendant is allowed to prevail.

BRETT, J.: I cannot say that this is otherwise than a case of difficulty; but, upon the whole, I think our judgment must be for the defendant. The plaintiff, being assignee of the original lessor, brings ejectment alleging that the term created by the lease has expired by effluxion of time: the defendant is the executor of an assignee from the original lessee. In the lease the term mentioned in the *habendum* is 94¼ years from the 24th of June, 1784; but the *reddendum* is as follows: "Yielding and paying therefor yearly and every year during the said term *of ninety-one years and one quarter of a year* hereby demised, unto [the lessor] the yearly rent of £3." In the counterpart, the term stated both in the *habendum* and in the *reddendum* is 91¼ years.

There are other circumstances mentioned in the case.

(1) 30 Beav., 445. (2) 16 Q. B., 745.

The indorsement on the counterpart indicates a term of 91½
607] years; and *that on the original lease had originally been 91½ years, but the 1 had at some uncertain time been changed into a 4. The house in question was one of a row of seven belonging to the same lessor and all demised about the same day, and the other six were all granted for 91½ years only. The evidence as to these facts was of course objected to; but it was argued for the plaintiff that they showed that the manifest intention of the original parties to the lease in question was to create a term of 91½ years, and that therefore the court should reform (or treat as reformed) the lease, and so make the whole consistent, viz., a lease for 91½ years. On the other hand, it was urged that a deed can only be reformed where the intention is manifest, and where the question arises between the original parties; and that here, the lease being in the hands of an assignee of the lessee, the court could neither reform it nor treat it as reformed. To this it was answered that the plaintiff is assignee of the lessor, and therefore had a right to assume from the counterpart in his possession that the term therein represented was the correct term; whereas, the defendant represents a purchaser from the lessee, who purchased according to the description in the lease, and consequently had more notice of the difficulty of the title than the plaintiff could have, and was bound to inquire. I think that argument cannot prevail. It is the plaintiff who is asking for the interference of the court,—for a reformation of the deed. Assuming, but not determining, that the court can look at all the facts set out in the case, and that those facts should induce us to reform this lease, I think, looking at the position of this plaintiff and this defendant, we ought not to reform it. The defendant has bought the premises from the lessee upon the faith of the lease. I cannot think it right to say that the purchaser of a lease, if the construction upon the face of it is doubtful, is under any obligation to look from the superior to the inferior document to see whether or not the two are consistent. He has a right to assume that the counterpart is in all respects in conformity with the lease. I think the plaintiff is not entitled to this remedy as against the defendant, who was not a party to the original lease. We must, therefore, treat the lease as unreformed.

Now, the authorities show that the lease and counterpart form one document, the lease being the superior; and that,
608] if there is *any discrepancy between them, the counterpart is to be considered wrong by the misprision

of the clerk, and the lease is to prevail; and, further, that the *habendum* is to prevail over the *reddendum*. The proper way, therefore, will be to regard as surplusage the words of the *reddendum*, "the said term of 91¼ years," leaving it to read "yielding and paying therefor yearly and every year during the said term hereby demised, unto [the lessor] the yearly rent of £3." The ejectment therefore fails, and the defendant is entitled to judgment.

ARCHIBALD, J.: I am of the same opinion. The question here arises upon a lease the *habendum* of which states the term to be 94¼ years from the 24th of June, 1784, and the *reddendum* unnecessarily repeating the term, stated it to be 91¼ years; in the counterpart the term is in both places stated to be 91¼ years; and the question is to which we are to give effect. On the part of the plaintiff, it is contended that he is entitled to have the lease reformed by the counterpart. But I think Mr. Graham has satisfactorily shown us that, the lease having been assigned to the defendant's testatrix, who had no means of knowing that there was any discrepancy between the instrument under which she bought and that under which the plaintiff bought, the Court of Equity would not reform the lease. Taking it therefore as unreformed, how are we to treat it? We were referred to Sheppard's Touchstone, p. 75, where the office of the *habendum* is, "to set down again the name of the grantee, the estate that is to be made and limited, or the time that the grantee shall have the thing granted or demised, and to what use." At p. 52 also the learned author, dealing with "the parts of a deed," says: "The office of the *habendum* is, to name again the feoffee, lessee, &c., and to set forth what estate he shall have, and for what time he shall hold the thing given or granted." That of the *reddendum* is, "to set forth by what rent he shall hold the land." Then at p. 53 we find this: "Although both parts of the indenture are but as one deed, yet the part of the grantor is as the principal, and the other is not but a counterpart. And therefore if the lessor only seal, and not the lessee, yet it is as good [to bind him] as if both had sealed [and frequently a grantee may be bound by acceptance, as an estoppel; *1 Inst., 143, a.]; and, if there be any difference be- [609
tween the parts, the counterpart shall be made to agree with the principal, and it [the error] shall be deemed the misprision of the clerk." It follows that we must read the *habendum* here as expressing the real intention of the parties to the original lease that the term should enure for ninety-four years and a quarter, and the mention of the term in the

reddendum may be treated as surplusage. I think we are bound so to deal with it; and, treating the *reddendum* as for 94¼ years, the lease will operate as creating a term of 94¼ years, and so all the covenants will apply consistently. Although, therefore, the case is not without difficulty, I think that is the true solution of it; and I agree with my Brother Brett that the defendant is entitled to judgment.

Judgment for the defendant.

Solicitor for plaintiff: *W. W. Hayne.*
Solicitors for defendant: *Mackeson, Taylor and Arnould.*

Where, in an action against a party for a forfeiture of a contract executed in duplicate, the copies produced by the respective parties vary in their phraseology, the court will follow the copy which is in the defendant's hands and by which he was governed in making his payments: Judd *v.* Ensign, 6 Barb., 258, 262.

[1 Common Pleas Division, 618.]

May 1, 1876.

618] *Parker v. The South Eastern Railway Co.

Railway Company—Bailment—Deposit of Property in Cloak room—Ticket—Condition indorsed thereon—"See Back."

On the deposit of articles at the cloak room at a railway station, a charge is made of 2*d.* for each, and the depositor receives a ticket on the face of which is printed the times of opening and closing the cloak room, and the words "See Back;" and on the back there is a notice that "the company will not be responsible for any package exceeding the value of £10." A placard, upon which is printed in legible characters the same condition, is also hung up in a conspicuous place in the cloak room.

The plaintiff deposited his bag (of the value of £24 12*s.*) in the defendants' cloak room, paid 2*d.*, and received a ticket. The bag was lost or stolen. In an action to recover its value, the plaintiff swore that, on receiving the ticket, he placed it in his pocket without reading it, imagining it to be only a receipt for the money paid for the deposit of the article; that he did not see the condition at the back of the ticket; nor did he see the notice hung up in the cloak room. The judge left two questions to the jury,—1. Did the plaintiff read or was he aware of the special condition upon which the article was deposited? 2. Was the plaintiff, under the circumstances, under any obligation in the exercise of reasonable and proper caution, to read or to make himself aware of the condition?

The jury answered both questions in the negative, and a verdict was entered for the plaintiff:

Held, that, upon these facts and findings, the company were responsible for the loss of the bag.

Mere notice, not brought home to and assented to by the depositor, is not enough in such a case to relieve the company from liability.

Henderson v. *Stevenson* (Law Rep., 2 H. L., Sc. 470) commented upon.

Action against the South Eastern Railway Company for the value of a bag and its contents lost to the plaintiff through the negligence of the company's servants.

The cause was tried before Pollock, B., at Westminster on the 27th of February last. The facts were as follows: The

plaintiff was a passenger by the defendants' railway. On arriving at Charing Cross station he deposited his portmanteau and travelling bag in the cloak room of the defendants, paid 4*d*., and received from the attendant a ticket on the face of which was the following :—

"South Eastern Railway. Charing Cross Station.

"2 articles.

"The public are informed that the office for the receipt and delivery of left luggage will be open on week days at 9 a.m., and closed at 11 p.m., and on Sundays from 7 a.m. to 11 a.m., and from 12.30 to 10 p.m.

*"After the expiration of seven days, property of [619 this kind not taken away by the owner must be sent to the unclaimed property office.

"3,386. L.B. 5th April, 1875."

[See Back.]

At the back of the ticket was a notice, as follows :—

"This company will not be responsible for articles left by passengers at the station unless the same be duly registered, for which a charge of 2*d*. per article will be made, and a ticket given in exchange; and no article will be given up without the production of the ticket, or satisfactory evidence of the ownership being adduced. A charge of 1*d*. per diem in addition will be made on all articles left in the cloak room for a longer period than twenty-four hours. The company will not be responsible for any package exceeding the value of £10."

The plaintiff on his return to the station a few hours after he had so deposited them, presented the ticket and demanded the portmanteau and bag. He received the former, but the latter (which with the contents was of the admitted value of £24 10*s*.) could not be and never was found.

The answer relied on by the company was the condition printed at the back of the ticket, and also the fact that a notice to the same effect was printed in legible characters on a placard which was publicly exhibited in a conspicuous part of the cloak room. The plaintiff denied having seen either; saying that, on receiving the ticket, he placed it in his pocket without reading it, as he imagined it to be only a receipt for the money paid for the deposit of the articles. He admitted, however, that he had received such tickets before.

The learned judge, having had his attention called to *Henderson* v. *Stevenson* (1), left two questions to the jury,—1. Did the plaintiff read or was he aware of the special con-

(1) Law Rep., 2 H. L., Sc., 470.

dition upon which the articles were deposited? 2. Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or to make himself aware of the condition? (1)

The jury answered both these questions in the negative, and the learned Baron thereupon directed judgment to be entered for the plaintiff for the amount claimed, reserving leave to the defendants to move to enter judgment for them.

620] *Feb. 1. *Willis* moved to set aside the judgment entered for the plaintiff, and enter judgment for the defendants, "on the ground that, upon the facts admitted at the trial, and notwithstanding the findings of the jury, the judge ought to have entered judgment for the defendants," or for a new trial, "on the ground of misdirection in telling the jury that they should find a verdict for the plaintiff if they thought that, considering the plaintiff's knowledge of the world and of life, and the nature and character of the transaction, he had used proper caution in not having read the document given to him at the time of the deposit." [He cited *Van Toll* v. *South Eastern Ry. Co.* (2), *Lewis* v. *M'Kee* (3), and *Stewart* v. *London and North Western Ry. Co.* (4)].

Prentice, Q.C., and *F. Pollock*, showed cause: The ticket in itself cannot amount to a contract: there must be an assent by both parties to constitute a valid contract; and here it must be taken that the plaintiff never had his attention called to the words printed on the back of the ticket, and that he never read them. *Henderson* v. *Stevenson* (5) is precisely in point. There, a ticket having on its face only the words "Dublin and Whitehaven" was given to a passenger, who, without looking at it, paid for it and went on board. In an action by the passenger against the steam packet company for the loss of his luggage, it was held to be no defence on the part of the company that on the back of the ticket there was an intimation that they were not to be liable for losses of any kind or from any cause. The language of Cairns, L.C., and of all the learned Lords who delivered judgments in that case is conclusive in favor of the plaintiff here.

[LORD COLERIDGE, C.J.: There was no reference on the face of the ticket there to the conditions printed on the back of it. It must be matter of evidence in each case.]

In *Van Toll* v. *South Eastern Ry. Co.* (2), the court were

(1) See *Symonds* v. *Pain*, 6 H. & N., 709; 30 L. J. (Ex.), 256.
(2) 12 C. B. (N.S.), 75; 31 L. J. (C.P.), 241.
(3) Law Rep., 4 Ex., 58, 60.
(4) 3 H. & C., 135; 33 L. J. (Ex.), 199.
(5) Law Rep., 2 H. L., Sc., 470.

to draw such inferences from the facts as a jury might have done, and the inference they drew was that the plaintiff knew of the special terms on which the bag was deposited, and assented to be bound by them. The same remark applies to *Stewart* v. *North * Western Ry. Co.* (1); and [621 *Zunz* v. *South Eastern Ry. Co.* (2) is disposed of by the observations of Lord Chelmsford in *Henderson* v. *Stevenson* (3).

[LORD COLERIDGE, C.J.: Pollock, C.B., puts it thus in *Stewart* v. *North Western Ry. Co.* (4): "As to the finding of the jury that the plaintiff was not aware of the contents of the time-bills, the rule applies, that a person must be presumed to know what he has the means of knowing, whether he avails himself of those means or not." If that is to be taken to be a proposition of law, it is distinctly overruled by the judgment in the House of Lords. It may be that it is a matter which may be fairly pressed before a jury.]

Willis and *Bremner*, in support of the order: *Henderson* v. *Stevenson* (5) does not decide this case. It may well be that that which is at the back of the document and is not seen is not part of the contract. But it is otherwise where there is on the face of the document given to the party a distinct reference to conditions printed on the back of it. In *Van Toll* v. *South Eastern Ry. Co.* (6) the facts were as nearly as possible the same as the facts here, and the form of the ticket was the same. Byles, J., says (7): "Suppose, instead of a notice limiting the liability of the bailees, this had been a notice to quit, or a notice of the dishonor of a bill, or a notice of objection to a vote for a county or borough, it would be a strong thing to say that a man might put such a notice into his pocket, and say he never read it." "Where a notice of this kind is given, it seems to me there may be two sorts of assents. One is, where the terms are read by the bailor, and then he puts the document into his pocket, and so assents to it expressly. But if, without reading it, he chooses to put it into his pocket, though he does not know one word it contains, it seems to me that he assents to it implicitly, whatever the terms may be, on two conditions. One of those conditions is, that the terms contained in the notice should be reasonable."

[LORD COLERIDGE, C.J.: Nobody seems to have asked

(1) 3 H. & C., 135; 33 L. J. (Ex.), 199.
(2) Law Rep., 4 Q. B., 539.
(3) Law Rep., 2 H. L., Sc., 470, 477.
(4) 3 H. & C., 135, 138; 33 L. J. (Ex.), 199.
(5) Law Rep., 2 H. L., Sc., 470.
(6) 12 C. B. (N.S.), 75; 31 L. J. (C.P.), 241.
(7) 12 C. B. (N.S.), at p. 87.

622] the *plaintiff whether she had read the notice or not. The Lord Chief Justice, however, seems to have assumed that she had.]

The cases of *York, Newcastle and Berwick Ry. Co.* v. *Crisp* (1) and *Van Toll* v. *South Eastern Ry. Co.* (2) were cited in *Lewis* v. *M'Kee* (3), and Willes, J., delivering the judgment of the Exchequer Chamber, expressly says that the court threw no doubt on the principles acted upon in those cases,—observing that, "in those cases, as part of the contract, and as expressing or intended to express the terms on which the parties were dealing, a written document was handed from the one to the other under circumstances in which, without negligence, the person receiving it could not be unaware of what the person delivering it meant to bind himself to." The true question for the jury, after the first, was, whether the plaintiff knew or had the means of knowing that the company were receiving the bag upon some special printed terms. If they found that affirmatively, they should have been directed to find for the defendants, on the ground that the plaintiff had assented to those terms without reading them, or that there was mutual error, and that the plaintiff's claim as a simple bailor was not made out.

[LORD COLERIDGE, C.J.: The plaintiff did not know that the terms upon which the company received his property were those printed on the back of the ticket. The jury have so found, and also that he was not negligent in not knowing it.]

They should have been asked whether he knew that there were special terms. [*Kerr* v. *Willan* (4) and *Rowley* v. *Horne* (5) were also cited (6).]

LORD COLERIDGE, C.J.: In this case the plaintiff sues the South Eastern Railway Company for damages for the loss of a portion of his luggage, he having been a passenger by their railway. The article in question (a travelling bag) had been delivered to the company at the cloak room of 623] their station at Charing Cross, and *2*d.* had been paid upon its being so deposited, and a ticket given to the plaintiff which upon the face of it purported to be an acknowledgment that the company had received the article. At the bottom of this ticket were printed the words "See

(1) 14 C. B., 527; 23 L. J. (C.P.), 125.
(2) 12 C. B. (N.S.), 75; 31 L. J. (C.P.), 241.
(3) Law Rep., 4 Ex., 58, 61.
(4) 6 M. & S., 150.
(5) 3 Bing., 2.
(6) At the close of his argument, Willis stated that a similar question was pending in the Queen's Bench Division, and that time had been taken for consideration. *Harris* v. *Great Western Ry. Co.*, 1 Q. B. D., 515,

back," and, when the back is looked at, certain conditions are found printed thereon, one of which is, "The company will not be responsible for any package exceeding the value of £10." It was admitted that the bag in question did exceed the value of £10. At the trial before Pollock, B., the plaintiff swore that, when he received the ticket, he put it into his pocket and did not read it, considering it to be a mere memorandum or receipt for the money paid, and that he did not see any placard hung up in the cloak room. He added that, having threatened to take proceedings against the company, his attention was for the first time called to the indorsement on the ticket. The learned Baron put two questions to the jury, viz., 1. Did the plaintiff read or was he aware of the special conditions upon which the articles were deposited? 2. Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or to make himself acquainted with the conditions? The jury answered both these questions in the negative. The question is whether, upon these facts and findings the defendants are responsible for the loss of the plaintiff's bag. I am of opinion that they are.

The question turns upon certain elementary propositions of the law of contract, qualified by some decisions. It seems to me to be impossible to say that there is no contract, supposing the fact to be that the condition printed on the back of the ticket was not brought home to one of the contracting parties. The facts which are relied on as evidence of a contract are these: The plaintiff hands in a bag to a servant of the company at a place called the cloak room, and pays 2*d.*, receiving in return a paper. It is impossible to say that, because there are on the back of that paper conditions which the company intend to form the basis of a contract, but which are not brought to the knowledge of the plaintiff, therefore there is no contract. The contract is the ordinary contract of bailment; and the company are bound to take care of the article intrusted to them. But it is said that, *though there may be such a contract [624 in the case supposed, at any rate that is not so here, because the company all along contracted to be liable only upon certain terms of which this is not one. It is further said that the circumstances were such that no one could without being guilty of negligence be unaware of the contents of the document given out as forming the basis of the contract, and that, as the plaintiff chose, without taking reasonable care to see what was on the paper, to leave the bag, he must be assumed to have assented to be bound by

conditions which were fairly brought to his knowledge, and that the company have therefore a right to rely on those conditions as forming part of the contract.

Now, it seems to me to be impossible, in common sense or upon the authority of any of the cases, to lay down any definite and fixed line with regard to which it can be said that a railway company are bound or not bound by such a document as this. It must in each case be a question of evidence and common sense. There are cases, no doubt, where, when a document has been handed to a man, he must be taken to have acquainted himself with its terms, and, if he has not in fact done so, it is his own fault, and he is bound by them. Take the case of a sale of land: a document is handed to the intending purchaser which contains the conditions of sale. Having had an opportunity of doing so, it must be assumed as against him that he has read the conditions, and assented to deal with reference to them. Can it be said that that is the case with a document like this? In every case of this kind it must be matter of evidence whether or not the conditions were so brought to the knowledge of the party sought to be bound as to satisfy a jury that those were the terms upon which both were contracting. That is the principle upon which the House of Lords decided the recent case of *Henderson* v. *Stevenson* (1). That case is on all fours with the present, with this exception, viz., that there the conditions were printed on the back of the ticket, without any reference to it on the face of the document; whereas here the ticket had on its face the words "See back." I do not, however, find that the reasoning of the
625] law Lords in giving judgment in that case is *satisfied by placing it on that distinction. The Lord Chancellor, it is true, after pointing out the particular condition at the back of the document, goes on to say: "With regard to the knowledge of the respondent of what was printed upon the back of the ticket, your Lordships have his own evidence, which is not controverted, and upon which he does not appear to have been challenged or cross-examined, that in point of fact he did not read and did not know what was printed upon the back of the ticket,"—words which seem to have been present to the mind of my Brother Pollock when he put the first question to the jury—"*There was nothing upon the face of the ticket referring him to the back, and there was nothing said by the clerk who issued the ticket directing the respondent's attention to what was printed upon the back.* Your Lordships therefore may take it as a

(1) Law Rep., 2 H. L., Sc., at p. 470.

matter of fact that the respondent was not aware of that which was printed upon the back of the ticket; consequently, so far as any intelligent knowledge of what was there printed is concerned, he cannot be taken intelligently to have agreed to the terms printed upon the back of the ticket." I understand his Lordship to mean that the evidence satisfied him that the terms by which the company intended the respondent to be bound were not brought to his notice: the absence of reference on the face of the ticket to the conditions on the back, and the absence of a reference to those conditions when the ticket was taken, were circumstances which induced him to come to the conclusion that the conditions were not brought to the notice of the passenger; but I cannot find that he anywhere says that, if those words of reference had been on the face of the ticket, he would have come to a different conclusion. His Lordship goes on to say (1) that he entirely agrees with the observation of the Lord Ordinary, that, "in a case like this, mere notice, not brought home to and assented to by the pursuer, is not enough." And he proceeds: "The question does not, as it seems to me, depend upon any technicality of law or upon any careful examination of decided cases. It is a question simply of common sense. Can it be held that, when a person is entering into a contract containing terms which *de facto* he does not know, and as to which he has received no notice, that he ought to inform himself upon *them? It appears to me to be impossible that that [626 can be held." From this I infer that, in his Lordship's opinion, if a notice was given, but not brought home to the plaintiff, that would not be enough. I find nothing in any of the other judgments to diminish the force of those observations. Lord Chelmsford (2) and Lord Hatherley (3) both hold similar language: and Lord O'Hagan says (4): "Proof of the respondent's knowledge and assent might have been given in various ways. In certain circumstances, denial of them might not be permissible; in others, a jury or a court might be satisfied of their existence from antecedent dealings, notoriety of custom, publication of notices, verbal communications, and so forth; but I agree with the Lord Chancellor that the mere receipt of a ticket, under such circumstances, and with such an indorsement as we have before us, is not shown by the authorities cited at the bar to furnish *per se* sufficient evidence of such assent or knowledge."

(1) Law Rep., 2 H. L., Sc., at p. 475.
(2) Law Rep., 2 H. L., Sc., at p. 476.
(3) Law Rep., 2 H. L., Sc., at p. 478.
(4) Law Rep., 2 H. L., Sc., at p. 480, 481.

Regard being had to the common and ordinary course of business, it seems to me to be reasonable that a man receiving such a ticket as this should look upon it as a mere voucher for the receipt of the package deposited, and a means of identifying him as the owner when he sought to reclaim it: and I think the jury were quite right in finding that the plaintiff in this case did not read the special condition, nor was he, under the circumstances, under any obligation to read it.

It is said that there are cases which were not cited upon the argument of *Henderson* v. *Stevenson* (1) in the House of Lords, where the courts had come to a different conclusion. There are, no doubt, cases where a different conclusion in point of fact has been arrived at. In *York, Newcastle and Berwick Ry. Co.* v. *Crisp* (2) and *Van Toll* v. *South Eastern Ry. Co.* (3), under the circumstances there appearing, this court held the companies to be exempt from liability, and the plaintiffs to be fixed with notice of the special terms of the contract, because there was evidence that they knew of
627] facts from which they must be taken to have *known what those special terms were. But in these and in numerous similar cases it was treated as a question whether upon the facts proved the jury could find or the court infer that the limitation of the contract relied on by the railway company was brought home to the knowledge of the defendant as a term of the contract. I find these cases thus summarized by Willes, J., in *Lewis* v. *M'Kee* (4): "In those cases, as part of the contract, and as expressing or intended to express the terms on which the parties were dealing, a written contract was handed from the one to the other under circumstances in which, without negligence, the person receiving it could not be unaware of what the person delivering it meant to bind himself to." It is, therefore, upon the circumstances of those cases and the findings of the jury upon the facts that that learned judge relies as distinguishing them from the case before him. In the present case it is found that the plaintiff was unaware of the conditions printed on the back of the ticket, and that he was so unaware without any negligence on his part: therefore, upon the two grounds upon which Willes, J., relies in dealing with those cases, I think this case is distinguished by the findings of the jury. I accept those decisions upon the ground stated by that learned judge. "If," he says (5), "one person

(1) Law Rep., 2 H. L., Sc., 470.
(2) 14 C. B., 527; 23 L. J. (C.P.), 125.
(3) 12 C. B. (N.S.), 75; 31 L. J. (C.P.), 241.
(4) Law Rep., 4 Ex., 58, 61.
(5) Law Rep., 4 Ex., at p. 61.

seeks to impose on another a liability by contract, but chooses to abstain from reading the terms of the document in which the liability is sought to be expressed, he is in this dilemma: either he has chosen to accept the terms without taking the trouble of informing himself what they are; or if not reading, he did not assent to the terms proposed, then no action lies, because one side has intended one thing, and the other a different thing, and the transaction is vitiated by mutual error. The first of these alternatives is probably the practical conclusion at which a jury would arrive." It seems to me that the cases which have been relied on as distinguishable from and as not governed by *Henderson* v. *Stevenson* (1), and as governing this case, are, when looked at, in accordance with the decision in that case, and distinguishable from this. It seems to me that no sound distinction can be taken between a condition on the face of the ticket and *one printed on the back of it. In each [628 case the question must equally be one of circumstances and construction,—was the plaintiff unaware of the condition upon which the company consented to accept his deposit, and, if he was, was it through his own culpable negligence that he was ignorant of it? If he was unaware of it without any negligence on his part, he cannot be bound by it. The jury in this case have found that the plaintiff was unaware of the condition, and that he was guilty of no negligence. It seems to me that the proper questions were left to the jury, and that their findings were warranted by the evidence. The case is really within the doctrine upon which the learned law Lords proceeded in *Henderson* v. *Stevenson* (1). I therefore think the rule must be discharged.

BRETT, J.: The plaintiff took to the cloak room at the defendants' station a portmanteau and a bag, and gave them to the servants of the defendants to keep them safely and to restore them to him on demand, and he paid for each 2*d.* for that service. Upon his so depositing his property and making that payment, the porter handed him a ticket. Upon the face of that ticket there was nothing to modify the ordinary bailment except the words "See back." . It turned out that on the back of the ticket there were certain conditions, amongst others one which provided that "the company will not be responsible for any package exceeding the value of £10." The bag, the value of which considerably exceeded £10, was lost. Under these circumstances, the plaintiff brings his action against the company for the non-return of the bag, founding his claim upon the ordinary

(1) Law Rep., 2 H. L., Sc., 470.

contract of bailment where the service is to be paid for. The answer set up by the defendants is, that the contract they entered into was not the ordinary contract of bailment, but a special contract, with a special limitation of the ordinary contract. This is not a case in which the terms of the contract need be in writing. It is a case in which, if no document at all passed between the parties, there would be a contract implied from the handing over the article and payment of the money, viz., the ordinary contract of bailment; and it is contended on the part of the plaintiff, that, 629] unless it can *be shown that his attention was called at the time of the delivery of the ticket to him to the limitations printed on the back thereof, he is not bound by them, but is at liberty to assume that the contract upon which he deposited his property was the ordinary contract of bailment. Now, it is not found or suggested that the plaintiff's attention was called to the conditions indorsed upon the ticket. The jury found that the defendant did not read nor was he aware of the special conditions upon which the articles were deposited,—that is, that he neither saw nor read the indorsement or the placard. They further found that the circumstances under which the ticket was handed to him were such that the plaintiff was not guilty of any want of proper caution in failing to make himself acquainted with the supposed conditions.

The contention on the part of the defendants is, that if, in making such a contract, that is, a contract of bailment, a document passes between the contracting parties, it is the duty of the person who receives it to read it; that, if there is nothing on the face of it to limit the ordinary liability of the bailee, the bailor may properly say that he is only bound by what he finds there; but that, if there is a reference on the face of it to something written or printed at the back, he is bound to look at the back of the document, and it is to be presumed as against him that he did so. The defendants raise that argument upon an order to enter judgment for them, on the ground that, upon the facts admitted, the learned judge ought to have entered judgment for them; that is, that, assuming the findings of the jury to be correct, the plaintiff ought to have read the conditions on the back of the ticket, and is bound by them as if he had read them. They also ask for a new trial on the ground of misdirection, which involves the same point.

As I have already intimated, in cases where the contract must be in writing, the party contracting is bound to read it, and must be assumed to have done so. But, where the

contract arises only by implication from the facts, and no document in writing is necessary, or where the document may or may not contain terms of limitation, I am aware of no case which decides, as matter of law, that the person to whom it is handed is obliged to make himself *ac- [630 quainted with its terms, and is bound by them as if he had done so. If the jury find that he did read the document, or that the circumstances were such that in the ordinary course of business it might fairly be assumed that he had read it, then of course he would be bound by it. But I apprehend it is open to the jury to say that he may have taken the document as one which would contain nothing to call for special attention. They might well say that people would naturally take a ticket of this sort as a mere voucher to be produced on demanding back the article deposited, and are not bound to expect it to contain any special limitation of the contract upon which the deposit was made, and so the omission to read it was not an act of culpable negligence. It may be that, if the defendants could show that the plaintiff here had read the face of the ticket, a jury would be warranted in saying he was guilty of negligence in not accepting the invitation to look at the back of it. The case of *Henderson* v. *Stevenson* (1) has been relied on as showing that the recipient of a ticket is bound to read the face of it, but that, if there be no reference thereon to the back, he is not guilty of negligence in omitting to read that which is on the back. But that case, as I read it, goes much further. It came before the House of Lords upon an appeal from a Scotch court upon a state of facts which showed that the pursuer was guilty of no negligence in not reading what appeared on the back of the ticket which he received in exchange for the passage-money. It is true that there the face of the ticket had on it no reference to the back: but the Lord Chancellor treats the question as one of evidence and common sense; and his expressions go the full length of holding the same rule to apply to the front as to the back of the document, viz. that, in the absence of evidence to show that the attention of the party is called to the alleged limitation of the ordinary contract of bailment, such limitation cannot be implied from the mere delivery of the ticket. I think that case is conclusive to show, that, as matter of law, there is no obligation on the party, under circumstances like these, to look either at the face or at the back of the ticket. *Lewis* v. *M'Kee* (2) has been relied upon as in favor of the defendants' view: but I must

(1) Law Rep., 2 H. L., Sc., 470. (2) Law Rep., 4 Ex., 58.

631] confess it seems to me *to be strongly in the plaintiffs' favor. There, goods were shipped under a bill of lading in the usual terms. The consignee of the bill of lading, being sued for the freight, pleaded that, before the time had arrived for the delivery of the cargo, he indorsed the bill of lading in these words, "Deliver to W. & K. or order, looking to them for all freight, dead freight, and demurrage, without recourse to us," and that the plaintiffs accepted the indorsement, and in pursuance of it delivered the goods to W. & K., and not to the defendant. At the trial it was admitted that the defendant would have been liable to W. & K. for any freight paid by them. There was a conflict of evidence as to whether the indorsement was or was not on the bill when it was shown to the captain, but the captain swore he did not see it. Martin, B., directed the jury that it was immaterial whether the indorsement was or was not on the bill unless the captain saw it, and that the onus lay on the defendant of proving that the captain saw and assented to it. A verdict having been found for the plaintiffs, the Court of Exchequer discharged a rule for a new trial on the ground of misdirection, and that ruling was affirmed by the Court of Error, where it was held that, the defendant having been at the time of the alleged indorsement liable for the freight, and admitting that he was still substantially liable, he was bound to prove an assent on the part of the plaintiffs discharging him from that liability, and that assent would not be proved by showing that the indorsement was on the bill when it was presented to the captain, without proving that the captain in fact assented to it. Willes, J., in delivering the judgment of the court, distinguishes the case in hand from *York, Newcastle and Berwick Ry. Co.* v. *Crisp* (1), and *Van Toll* v. *South Eastern Ry. Co.* (2).

As to *Van Toll* v. *South Eastern Ry. Co.* (2) and the other cases relied on for the defendants, they are distinguishable, on the ground that the court, having power to draw inferences, drew the inference that, on the facts proved or admitted, there had been no negligence; whereas here, as in *Henderson* v. *Stevenson* (3), the court is not at liberty to
632] draw inferences, the question of negligence *having been left to the jury, and they having negatived negligence.

We have been asked to suspend our judgment in this case, because it is said that there is a similar case pending

(1) 14 C. B., 527; 23 L. J. (C.P.), 125.
(2) 12 C. B., (N.S.), 75; 31 L. J. (C.P.), 241.
(3) Law Rep., 2 H. L., Sc., 470.

in the Queen's Bench Division, in which the court has taken time to consider its judgment. If I had thought that the circumstances of that case were really the same as those of the present case, I should have felt inclined for my part to reserve my opinion: but I do not find that they are so. That case was tried before Baron Pollock (the same learned judge who tried this case) without a jury, and he reserved the question for the court, giving them full power to draw inferences of fact (1). But here, unless we find that there has been a misdirection, or that upon the facts proved the judgment ought to have been entered for the defendants notwithstanding the findings of the jury,—there being no motion for a new trial on the ground that the verdict was against the weight of evidence,—we are bound by the finding of the jury that the plaintiff was guilty of no negligence or want of reasonable care in abstaining from looking at the ticket.

Upon the whole, therefore, I think, in obedience to the decision of this court in *Van Toll* v. *Eastern Ry. Co.* (2) and of the House of Lords in *Henderson* v. *Stevenson* (3), we are bound to discharge this order.

LINDLEY, J.: I am of the same opinion. The contract, if any, was the ordinary contract of bailment, or the special contract to be found on the back of the ticket. The jury having negatived the latter, it follows that the contract was the ordinary contract of bailment. It has been urged that there is no contract at all, because, assuming that the plaintiff did not look and was not bound to look at the special conditions indorsed on the ticket, the parties were not at one. But, on the finding of the jury, I think we cannot say that the defendants did not accept the article, to be taken care of by them, without any special terms. *Henderson* v. *Stevenson* (3), therefore, is undistinguishable from this case, except *for the words "see back," which did not ap- [633 pear on the face of the ticket in that case. But the findings here make that distinction immaterial. After the conclusions of fact which the jury have drawn, it is, upon the authority of that case, quite immaterial whether the special terms relied on were on the front or on the back of the ticket.

Order discharged.

Solicitor for plaintiff: *G. W. Digby.*
Solicitor for defendants: *W. R. Stevens.*

(1) *Harris* v. *Great Western Ry. Co.*, 1 Q. B. D., 515.

(2) 12 C. B. (N.S.), 75; 31 L. J. (C.P.), 241.

(3) Law Rep., 2 H. L., Sc., 470.

See 13 Eng. R., 152 note; 14 Eng. R., 618 note; 17 Eng. R., 174 note.

[1 Common Pleas Division, 654.]

May 20, 1876.

654] *The Steamship Company "Norden" v. Dempsey.

Shipping—Charterparty, Construction of—Arrival of Ship—Commencement of Lay Days—Local Custom—Foreigner.

Timber was consigned, under a charterparty made at Riga, to the Canada Dock in the port of Liverpool, a given number of days being allowed for unloading there:

Held, that, by the general law, the lay days commenced from the time the ship arrived in the dock; but that it was competent to the consignee to show, notwithstanding the plaintiff was a foreigner, that there was a custom in the port of Liverpool, that, in the case of timber ships, the lay days commenced only from the mooring of the vessel at the quay where by the regulations of the dock she was alone allowed to discharge.

Action for demurrage upon a charterparty and bills of lading made at Riga, in the following terms:—

"It is this day mutually agreed between the undersigned F. H. Holm, merchant of this town, on the one part, and C. Michelsen, master of the steamship Pamona, on the other,—That the said ship, being tight, staunch, and every way fitted for the voyage, and being also provided with the necessary ship's documents, shall receive and load from the merchant a full and complete cargo and deck cargo, not exceeding what she can reasonably stow and carry, consisting of square half fir sleepers, and, being so loaded, shall with all convenient speed proceed from Mühlgraben to Liverpool, or so near thereunto as she may safely get, to deliver there the said cargo always afloat, according to the tenor of the bills of lading. After due delivery of the same in good order and well conditioned (all dangers and accidents of the seas and rivers, &c., excepted), the receiver shall pay to the captain or to his order for freight for each load of 50 cubic feet, customs' calliper measure, square half sleepers, 17*s.* 6*d.* British sterling; deck cargo to pay full freight; captain to receive £5 sterling in gratuity; all in sterling money of Great Britain; one-half in cash, and remainder in approved bills on London at three months' date, or less bank discount at captain's option, without any delay or deduction whatsoever. The cargo is to be loaded and discharged together in ten working days, or for every day longer detained the captain to receive demurrage at the rate of £40 sterling per day; and to be delivered here alongside of the vessel, and at port of delivery to be taken from alongside free of expense to the ship.

"Steamer to be free of address at port of discharge, but

to be cleared at the custom house, Riga, by P. Bornholdt, on usual terms. Sufficient cash for ship's disbursements to be advanced on account of freight, on usual terms. The ship is expected discharged at Surnimünde on the 25th of August instant. A commission of 2 per cent. on amount of freight is due by the ship on signature of this agreement to P. Bornholdt & Co. And, for the due performance, &c.

"Dated at Riga, this 12/24th day of August, 1875."

*In the margin was the following memorandum: [655

"Discharging dock to be ordered on arrival of steamer at Liverpool. Steamer to clear at Liverpool by R. Heyn, jun., paying usual reporting fee only."

The sleepers were shipped under two bills of lading. The first was as follows:

"Shipped in good order and well conditioned by F. H. Holm, in and upon the good ship called the Pamona, S.S., whereof is master for the present voyage C. Michelsen, and now riding at anchor in the river of Riga, and bound for Liverpool to such dock as ordered on arrival, 8,125 red wood sleepers of 5x10 8½ feet long, being marked and numbered as in the margin, and are to be delivered in like good order and well conditioned at the aforesaid port of destination (the act of God, &c., excepted), unto order or assigns, he or they paying freight for the said goods, and all other conditions as per charterparty, with primage and average accustomed. Dated in Riga the 18/30 August, 1875."

In the margin were these words, "Two days expended in loading this parcel." The second bill of lading, dated "Riga, the 21 August, 2 September, 1875," was in like terms, but for 12,801 sleepers; and in the margin were these words,—"Three days expended in loading this parcel. For discharging the whole cargo at Liverpool are left five days."

The cause was tried before Lush, J., at the last winter assizes at Liverpool. The facts were as follows: The plaintiffs, shipowners at Copenhagen, by the instrument above set out, chartered the Pamona to carry a cargo of railway sleepers from Riga to Liverpool. The sleepers consisted of two parcels, one of which (consisting of 12,801 sleepers) was consigned direct to the defendant, a timber merchant at Liverpool, he being also assignee of the bill of lading of the other parcel, consisting of 8,125 sleepers. The Pamona left Riga on the 2d of September, arrived in the Mersey on Sunday, the 12th, and got into the Canada Dock (one of

the two docks in the port of Liverpool where timber ships are usually unladen), to which she was ordered on arrival, on the 13th, but, by reason of the crowded state of the dock, she did not get a berth at the quay where the unloading was by the regulations of the dock to take place until the 17th; and she commenced unloading on the 18th, and finished on the 23d.

The plaintiffs claimed demurrage from the expiration of five days after the Pamona got into the Canada Dock. The defendant, on the other hand, sought to show that there was a custom in the port of Liverpool that in the case of 656] timber ships the lay days *commenced only from the mooring of the vessel at the quay where she was alone allowed to discharge, and not from the time of her entering the dock. Thus, according to the plaintiff's contention, the ship should have been discharged by Saturday, the 18th, instead of the 23d.

The following question was put by the defendant's counsel to one of his witnesses,—"Is there any usage in the timber trade at Liverpool as to when the lay days commence?" This was objected to by the plaintiffs' counsel, and the objection was allowed. The question was repeated in a slightly varied form, and again objected to and rejected. It was finally put thus,—"Is there any custom in the port of Liverpool, with regard to ships in the timber trade, as to when they are deemed to have arrived at their usual place of discharge?" This also was objected to, and was rejected by the learned judge, on the ground that the alleged custom was too limited, being confined to a particular trade and to vessels bringing a particular description of cargo.

A verdict having been found for the plaintiff,

Jan. 13. *Herschell*, Q.C., obtained an order *nisi* for a new trial on the ground of improper rejection of the evidence tendered as to the alleged custom, or (pursuant to leave reserved) to reduce the damages.

May 5, 8. *Cohen*, Q.C., and *Edwards*, Q.C., showed cause: The conditions of the charterparty being incorporated in the bills of lading, the plaintiffs were entitled to demurrage from the expiration of the lay days, which commenced on the arrival of the ship in the Canada Dock, the voyage being then completed: *Randall* v. *Lynch* (1); *Brown* v. *Johnson* (2); *Kell* v. *Anderson* (3); *Tapscott* v. *Balfour* (4); 1 Parsons on Shipping, p. 313. The defendant sought to

(1) 2 Camp., 352; 12 East, 179.
(2) 10 M. & W., 331.
(3) 10 M. & W., 498.
(4) Law Rep., 8 C. P., 46.

prove a local custom by which, it was said, the lay days commenced, not from the arrival of the ship in the dock, but from the time of her being moored at the quay appropriated by the regulations of the dock for the unloading of such a cargo. This evidence was objected to upon several grounds. In the first *place, because it was an attempt to con- [657 tradict or vary the terms of the contract which the parties had entered into. In the next place, this being a foreign charterparty, and the shipowners a foreigner company, they could not be bound by a local custom of which they could not be assumed to be cognizant: *Hathesing* v. *Laing* (1); *Kirchner* v. *Venus* (2). Further, the alleged custom has reference, not to the port of Liverpool generally, but to a particular part of the port, and to a particular trade. The only ground upon which evidence of custom is admissible is, that the parties must be taken to have known and to have intended to contract with reference to it: per Blackburn, J., in *Robinson* v. *Mollett* (3): and see 1 Duer on Insurance, p. 258, where it is said, "It is to be collected from the decisions that in these cases a usage that can alone be allowed to control the interpretation of the policy, or vary the legal rights of the parties, must be general, uniform, notorious, reasonable and consistent with the terms of the policy, and to a certain extent with the rules of law."

May 9. *Herschell*, Q.C., and *T. H. James*, in support of the order: The question in its last form was clearly admissible: its tendency was not to contradict or to vary the terms of the charterparty. It was the duty of the shipowners to bring the ship to the dock to which she was ordered in the port of Liverpool. It was open to the defendant to show that by the custom of the port, Liverpool does not mean the port of Liverpool generally, or a particular dock only, but a particular part of the dock assigned to ships in a given trade. In *Kell* v. *Anderson* (4) the charterparty was for a voyage from Newcastle to London; and Lord Abinger said (5): "The days of demurrage must be counted from the time of the arrival of the vessel at *the place of discharge according to the usage of the port.*" Parke, B., goes further, and says: "It appears to me that the question in this case is one of fact, viz., at what time the vessel arrived at her place of discharge according to the usage of the port of London *for such vessels.*" That case is a strong authority for the defendant. This point was not

(1) Law Rep., 17 Eq., 92.
(2) 12 Moo. P. C., 361, 399.
(3) Law Rep., 7 C. P., 84, 103.
(4) 10 M. & W., 498.
(5) 10 M. & W., at p. 502.

658] raised in *Tapscott* v. *Balfour* (1). *The circumstance of the charterparty being made abroad, or of one of the parties to it being a foreigner, makes no difference..

Cur. adv. vult.

May 20. LORD COLERIDGE, C.J.: This was a motion for a new trial, on the ground of improper rejection of evidence tendered on the part of the defendant at the trial. The question arose thus: The ship Pamona was chartered at Riga for the conveyance of a cargo of railway sleepers to Liverpool, consigned to the defendant. The charterparty contained (amongst others) this stipulation,—"The cargo is to be loaded and discharged together in ten working days, or for every day longer detained the captain to receive demurrage at the rate of £40 sterling per day." In the margin of the charterparty were these words,—"Discharging dock to be ordered on arrival of steamer at Liverpool." The Pamona arrived in the Mersey on Sunday, the 12th of September, 1875, and was ordered to the Canada Dock, that being one of the docks where timber ships are usually unladen. She got into the dock on the 13th, but, by reason of its crowded state, she did not get a berth at the quay where the unloading was to take place until the 17th. She commenced unloading on the 18th, and finished on the 23d. By memoranda on the two bills of lading, it appeared that five of the ten lay days had been expended in loading the sleepers at Riga, and consequently there remained only five days for unloading at Liverpool. The question was, when did those days commence; whether from the ship's arrival in the Canada Dock, or from her being moored at the quay berth at which alone she could discharge her cargo,—in other words, at what time could it be said that the ship under the terms of this charterparty arrived at Liverpool.

Now, it is plain upon principle, and upon authority also, if authority were wanted, that, where the lay days are to commence running "on arrival" at the ship's port of discharge, evidence may be given to show what is commonly understood to be the port. Some ports are of large area, and by custom "arrival" is understood to mean arriving at a particular spot in the port. That has been held as to the ports of London, Hull, Antwerp, and many others. The 659] port of Liverpool, as we all know, is of many *miles extent, with a series of docks for different classes of ships and trades. It cannot be denied that, if any question arose upon it, it would be perfectly legitimate to receive evidence to show that arrival "in the port of Liverpool" did not

(1) Law Rep., 8 C. P., 46.

mean arriving at the mouth of the Mersey. Here, the vessel was shown to have arrived at the Canada Dock on a certain day. It was sought to carry the doctrine of expanding documents by parol evidence further, and to show that, in the case of a timber ship, those words were not satisfied by arrival in the dock, but that the ship must have reached an unloading berth at the quay. If that were so, the verdict would be wrong, and the defendant would not be liable. But, if arrival in the dock itself be enough, under the terms of this charterparty, the plaintiff is entitled to retain his verdict. At the trial, the defendant's counsel proposed to put certain questions for the purpose of showing that, according to the custom of the port of Liverpool, a vessel arriving with a timber cargo was not to be considered as having arrived at her place of discharge until she had got a berth and quay space to unload in. The question first put was this,—"Is there any usage in the timber trade at Liverpool as to when the lay days commence?" That was objected to, and rejected by the learned judge, and the rejection was acquiesced in. The question was repeated in a modified form and again rejected. It was finally put thus,—"Is there any custom in the port of Liverpool, with regard to ships in the timber trade, as to when they are deemed to have arrived at their usual place of discharge?" That question was carefully considered, but the learned judge rejected it, on the ground that the alleged custom was too limited, being confined to a particular trade and to vessels bringing a particular description of cargo. I am of opinion that the question in that shape and at that time ought to have been allowed to be put, and that its rejection is ground for a new trial. Principle and authority have alike decided that, where the question is what particular part of an extensive port a vessel must have reached before she can be said to have arrived at her destination, evidence may be given as to the usage of the port in that respect. Such evidence has been allowed by judges, and the propriety of receiving it has upon many occasions *been recognized by the [660 courts, upon the ground that it is not offered for the purpose of contradicting but merely to explain the contract. If by the usage of the port arrival means coming to a particular spot in the port, evidence has always been allowed to show that. The question in substance was, what, according to the custom of Liverpool, is the place of arrival of a timber ship coming to that port? The contract must be taken to have been made with reference to the usage of the port. This is but going another step in the same direction.

We have been pressed with the authority of cases in which it has been held (or assumed), and rightly, in the absence of such evidence as this, that arrival in port, as a general rule, means arrival in the docks, if docks there are. *Brown* v. *Johnson* (1) and *Kell* v. *Anderson* (2) were cited for that purpose. Those cases are good authority for that proposition: but they are no authority against the proposition which the defendant contends for here. There is no case to be found in which evidence of a usage such as this has been rejected; and I see no principle for its rejection. Perhaps the nearest approach to an authority is the dictum of Lord Ellenborough in *Randall* v. *Lynch* (3): but the circumstances of that case were totally different: the agreement of the parties fixed the period for the commencement of the lay days, viz., the day the ship was reported at the Custom House. Without saying what would have been the result had the question been allowed, it appears to me that the case was stopped too short. I think there should be a new trial.

BRETT, J.: This is an action against the consignee of a cargo of sleepers; the defendant being the holder of a bill of lading which described the vessel to be "bound for Liverpool to such dock as ordered on arrival," and the goods to be deliverable "at the aforesaid port of destination unto order or assigns, he or they paying freight for the said goods and all other conditions as per charterparty." The charterparty was made at Riga. The ship was to proceed from Mühlgraben to Liverpool, or so near thereto as she might 661] *safely get, to deliver there the cargo always afloat according to the tenor of the bills of lading. The charterparty contained the following clause: "The cargo is to be loaded and discharged together in ten working days, or for every day longer detained the captain is to receive demurrage at the rate of £40 sterling per day; and to be delivered here alongside of the vessel, and at port of delivery to be taken from alongside, free of expense to the ship." In the margin of the charterparty was the following memorandum, "Discharging dock to be ordered on arrival of steamer at Liverpool." The ship arrived at Liverpool on the 12th of September, 1875. There are two docks in the port of Liverpool in which timber ships are unladen, viz., the Canada Dock, and the Brunswick Dock. The vessel in question was ordered to the former of these docks, and she arrived there on the 13th; but she could not for some days obtain

(1) 10 M. & W., 331. (2) 10 M. & W., 498.
(3) 2 Camp., 852; 12 East., 179.

a quay berth. It must be taken that a cargo of this description is not allowed to be unloaded in the Canada Dock except at a quay berth. The question was, whether the lay days were to be counted from the arrival of the ship in the Canada Dock or only from the time of her getting to a berth alongside the quay. The defendant's counsel proposed to ask this question,—"Is there any custom in the port of Liverpool, with regard to ships in the timber trade, as to when they are deemed to have arrived at their usual place of discharge?" This was for the purpose of obtaining information,—to show that timber ships in the Canada Dock are not allowed to commence unloading until they get a quay berth, and that by the usage of the port the lay days reckon only from that time. The question was objected to, and was disallowed. Upon showing cause against the order for a new trial upon the ground that the question was improperly disallowed, it was argued by Mr. Cohen that the question was inadmissible, for several reasons. In the first place he contended that, upon the true construction of this charterparty, the tendency of the proposed question was to contradict the contract, for that, by reason of the marginal entry, the final destination of the ship was a dock to be named, and therefore the place of arrival was the Canada Dock, the dock to which the ship was ordered on reaching the Mersey; and that to allow a question as to a custom of the port for interposing *a particular part of that [662 dock as the place of arrival, would of necessity contradict the words of the charterparty. He then argued that, assuming the question to be admissible and proper if the charterparty had been a Liverpool charterparty, it could not be so in this case because the charterparty was made at Riga. He further argued that, even though an Englishman might be bound by such a custom in the case of a charterparty made abroad, evidence of the custom could not be received where one of the parties to the contract was a foreigner. He further argued that the evidence was inadmissible because it professed to set up a custom of the port of Liverpool as to unloading, not as applicable to the whole port or to all trades, but as applicable to a particular part of the port and to a particular trade only.

As to the first point, whether the proposed question would add to or vary the terms of the charterparty, if that was the effect of it I think it was inadmissible. This charterparty was made at Riga. To attempt to vary it by showing a custom of the port of Liverpool, evidence of which would be admissible only upon the supposition that it was known to

both parties to the contract, could not be allowed. I do not accede to the proposition that there is any distinction in this respect where one of the parties to the contract is a foreigner. But I do not think the proposed question has the effect of varying the terms of this charterparty. The contract is, to carry the cargo to Liverpool, a certain number of days being allowed for loading the ship at the port of loading and for unloading her at the place of discharge. Here, Liverpool is the place of discharge. The question therefore is, what is the meaning of "Liverpool?" It is not contended that the vessel arrived at Liverpool the moment she entered the Mersey, but only when she entered a Liverpool dock,—when she had arrived at a place where according to the custom of the port she was considered as an arrived ship. It is then only that the lay days are to commence. If when she has so arrived she cannot, either by reason of the crowded state of the dock or of the regulations of the dock, commence unloading at once, this will not affect the rights of the shipowner if she be an arrived ship. If she be an arrived ship when she gets into the Canada
663] Dock, the rights of the owner upon *a contract made at Riga cannot be affected by any regulations of the dock authorities at Liverpool as to the time or mode of unloading. That is settled by *Brown* v. *Johnson* (1) and *Kell* v. *Anderson* (2). *Randall* v. *Lynch* (3) is no authority to the contrary of what we are now deciding: and I think *Brereton* v. *Chapman* (4) is an authority in support of it. Practically, the very question now objected to was asked there. I think the question was admissible because it was a question tending to solve the fundamental question, when was the ship an arrived ship?

LORD COLERIDGE, C.J.: My Brother Lindley desires me to say that he concurs in this judgment.

Order absolute for a new trial.

Solicitors for plaintiffs: *Sharp, Parker & Co.*, for William Tyndal, Liverpool.

Solicitors for defendant: *Field, Roscoe, Osbaldeston & Co.*, for Bateson & Co., Liverpool.

(1) 10 M. & W., 331.
(2) 10 M. & W., 498.
(3) 2 Camp., 352; 12 East, 179
(4) 7 Bing., 559.

See 13 Eng. Rep., 291, note; *Caffarini* v. *Walker*, Irish Law Rep., 431, affirmed 10 id., 250; *Thiis* v. *Byers*, 3 Asp. Mar. Cases, 147.

[1 Common Pleas Division, 707.]

May 31, 1876.

*The Croydon Commercial Gas Company v. Dickinson and Others. 707

Principal and Surety—Discharge of Surety by Time given to Principal—Contract for Performance at several distinct Times.

Although where one enters into a bond as surety for the performance by another of two things which are separate and distinct, a subsequent alteration of the principal's contract as to one of them without the surety's consent does not release the surety from his contract of suretyship as to the other, yet, where the contract is one entire contract for the performance by the principal of two or more things at different times, if by any dealing with the principal without the consent of the surety the latter is discharged as to one of them, his liability as surety is altogether released.

When once a surety is relieved from the obligation which he has undertaken, that obligation cannot be renewed by any subsequent act to which he is no party.

D. contracted with a gas company to take from them tar and ammoniacal liquor, and to pay for each month's supply within the first fourteen days of the ensuing month after the account rendered, "unless the company should by writing signed by their secretary allow a longer time for payment." The defendant became surety for the performance of the contract by D.

On the 3d of August an account was delivered for the July supply; and after the fourteen days had expired, viz., on the 21st, the secretary of the company, without the knowledge of the surety, sent D. a letter inclosing a promissory note at a month for the amount, with a request that he would sign and return it. D. signed the promissory note and returned it to the secretary, who kept it:

Held, that, assuming this to be a giving of time "by writing signed by the secretary," within the meaning of the agreement, being after breach the surety was released; and that, once released, he was not liable in respect of debts contracted in respect of subsequent months' supplies.

Action against Dickinson as principal, and Pollard & Child as sureties, on a bond.

Statement of claim. 1. The defendants, by their bond dated the 20th of January, 1874, became bound to the plaintiffs in £250 to be paid by the defendants to the plaintiffs.

2. The bond was and is subject to a condition thereunder written, whereby, after reciting that A. J. Dickinson had that day entered into an agreement with the plaintiffs respecting the purchase of tar and ammoniacal liquor and the punctual removal thereof as therein mentioned and the payment for the same as therein also particularly mentioned, and with a penalty therein specified of £100 for every breach of the said agreement to remove the said *tar and [708 ammoniacal liquor as therein also mentioned, it was conditioned that if the said A. J. Dickinson well and truly performed the said agreement in all things, and made good all the payments due from him under or by virtue thereof, then

the bond should be void, but otherwise it should remain in full force.

3. The said A. J. Dickinson did not make good payments of moneys amounting to £234 11*s.* 1*d.*, which became owing and are due from him under and by virtue of the said agreement, being for and in respect of tar and ammoniacal liquor purchased of the plaintiffs and had by the said A. J. Dickinson under and by virtue of the said agreement between the 20th of January, 1874, and the 30th of September, 1875, accounts whereof have been from time to time rendered to him.

4. The said £234 11*s.* 1*d.* is due and owing to the plaintiffs.

The plaintiffs claim £234 11*s.* 1*d.*

The defendant Dickinson pleaded a composition under the liquidation clauses of the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71, ss. 125, 126.

Statement of defence by Pollard:

1. The defendant admits the statement of facts in the first and second paragraphs of the plaintiffs' statement of claim.

2. The defendant says that the said agreement was as follows:—

"Memorandum of an agreement made this 20th of January, 1874, between the Croydon Commercial Gas and Coke Company, hereinafter called "The Company," of the one part, and A. J. Dickinson, of Trundley Lane, Deptford, in the county of Kent, manufacturing chemist, of the other part.

"1st. That the company shall sell and Dickinson shall buy all the surplus tar made at the company's works at Waddon, in the parish of Croydon, in the county of Surrey, between the 1st of October, 1873, and the first of October, 1875, and which the company shall have to dispose of for distilling purposes, at the price of 1½*d.* per gallon (except 50,000 gallons more or less of tar agreed to be sold to Grindley & Co.).

"2dly. That the company shall sell and Dickinson shall buy all the ammoniacal liquor made at the company's works at Waddon (except 100,000 gallons more or less agreed to be sold to Messrs. M'Dougall), and that the price shall be £2 for every 1,000 gallons of ten-ounce strength, with the addition of 4*s.* 6*d.* per ounce per 1,000 gallons for every additional ounce in strength above ten ounces per gallon strength, and so in proportion for any less quantity of any of the strengths above alluded to.

"3dly. Dickinson agrees to provide proper tanks and re-

ceptacles, and to remove the said tar and ammoniacal liquor at such days and times as may be *required by the [709 company by notice in writing signed by their secretary, with at least three clear days' notice; such writing to be given to Dickinson or sent by post to the address above mentioned, or to any other residence or place of business that he may use for the time being.

"4thly. Dickinson agrees that if he shall fail to remove all the tar and ammoniacal liquor, or either of them, as required to be removed by the company by such notice or notices as aforesaid, he will pay to the company the sum of £100 as liquidated damages for every breach of his agreement to remove the same as aforesaid: And it is further agreed that if at any time or times the company shall find from their manager that the tar or ammoniacal liquor at their works is likely to overflow the tanks, they shall be at liberty to prevent such overflow by selling off either tar or ammoniacal liquor to any other person or persons, whether chemical manufacturers or otherwise, and that such sale or sales shall not be considered a breach of this agreement.

"5thly. Dickinson agrees that the account of tar and ammoniacal liquor had by him shall be estimated on the last day of every calendar month, and the payment for the same shall be made within the first fourteen days of the ensuing month after every estimate shall be so made, unless the company shall, by writing signed by their secretary, allow a longer time for payment, and the first monthly estimate shall be made on the 1st of February next.

"6thly. That, if the said A. J. Dickinson, his executors, administrators, or assigns, shall make any breach or non-performance of any of the clauses of this agreement, it shall be lawful thereupon, or at any time afterwards, notwithstanding any subsequent payment or receipt or settlement of accounts, for the company to determine this agreement by giving or leaving seven days' notice in writing, signed by their secretary, of their intention to determine the same; such notice to be given or sent as hereinbefore required with respect to the notices before mentioned.

"Lastly. This agreement shall bind the executors and administrators of Dickinson as effectually as if those words of representation were used after his name throughout. Witness the hand of the secretary of the company by order and on behalf of the company, and the hand of the said John Arthur Dickinson."

(Signed by Russell, the secretary, and by Dickinson.)

and that the account of tar and ammoniacal liquor was not

estimated as in and by the agreement prescribed, and although the said company did not at any time by writing signed by their secretary allow a longer time for payment as provided by the agreement.

3. The defendant says that the plaintiffs did not deal with Dickinson on the terms of the agreement between them and Dickinson; but, without the knowledge and consent of the defendant, dealt with him in a wholly different manner and on wholly different terms, and so as to prejudice the defendant thereby, and gave time for payment to Dickinson of moneys due under the agreement in a binding manner and
710] by contract founded on *sufficient consideration without the knowledge or consent of the defendant, and beyond the time prescribed by the agreement.

4. The defendant does not admit the allegations of fact in the plaintiffs' third and fourth paragraphs contained.

The statement of defence delivered on behalf of Child was in all respects the same as Pollard's.

Reply. 1. The plaintiffs admit that the agreement was as set forth in the second paragraph of Pollard's statement of defence. 2. They join issue upon the residue of that statement.

The cause was tried before Denman, J., at the last Hilary sittings for Middlesex. The action as against Dickinson was discontinued, and as against Child withdrawn with the consent of Pollard. The facts were as follows: Dickinson, a manufacturing chemist at Deptford, had been in the habit of purchasing from the plaintiffs tar and ammoniacal liquor; and in January, 1874, the agreement mentioned in Pollard's statement of defence was entered into between them. The course of business was as follows,—The amount due for the products supplied to Dickinson was ascertained at the end of each month, and an account sent in to Dickinson to be paid within fourteen days. The account for July, 1875, was made up and forwarded to Dickinson about the 3d of August (which was as soon as reasonably could be). The amount was £215 16*s.* 8*d.*, of which £100 was afterwards paid, leaving a balance of £115 16*s.* 8*d.*

Russell, the secretary of the company, who was called as a witness, stated that, on the 21st of August, 1875, he sent a note signed by himself to Dickinson, inclosing a promissory note for £115 16*s.* 8*d.*, payable at a month, which he requested Dickinson to sign and return to him. This Dickinson did; but the note was dishonored at maturity. Russell further proved that the amounts remaining unpaid were as follows: Down to the end of July, 1875, £115 16*s.* 8*d.*; ad-

ditional down to the end of August, £49 11*s.* 9*d.*; and to the end of September a further sum of £69 1*s.* 2*d.*

Upon cross-examination, the witness was asked,—"What passed between you and Pollard as to the mode in which Dickinson was paying under his former contract at the time the bond was executed?" The question was objected to, but was allowed, *subject to the objection. The [711 answer was,—"He said, 'How are you going on with Dickinson in the matter of payment?' I said, 'I am taking a note at a month.' He said, 'Oh! very well.' It was after the bond was executed."

The defendant Pollard admitted that no time was specifically given as to the August and September accounts; but contended that there had been a systematic giving of time from first to last; that "payment" meant payment in cash; that the sureties were entitled to a strict performance of the contract; that there was no consent by Pollard to the course adopted; and that, as regarded the July account, the letter of the 21st of August was not time given by the company, by writing signed by their secretary, within the meaning of the agreement.

For the plaintiffs it was insisted that there had been no departure from the true intention of the agreement, and that, as to the July account, the letter of the secretary was a writing signed by him within the fifth paragraph of the agreement.

The learned judge left it to the jury to say whether Pollard knew and consented that the monthly payments should be made as they were, and whether the plaintiffs were acting under the contract in taking payment by promissory notes.

The jury answered both questions in the negative; and judgment was thereupon entered for Pollard, leave being reserved to the plaintiffs to move to enter judgment for them for £115 16*s.* 8*d.*, or for £118 12*s.* 11*d.*, or for both, as against Pollard, as the court might hold them entitled.

Walpole and *Grantham* moved accordingly: The course of business as between the plaintiffs and Dickinson was to send at the end of each month an account of the supply of products, and to take a promissory note for the amount payable at a month; and this was known to the sureties. The 5th article of the agreement between the company and Dickinson, upon which the question turns, provides that each month's account shall be paid within the first fourteen days of the ensuing month after the estimate shall be made, "unless the company shall by writing signed by their secretary

allow a longer time for payment." This clause has been strictly acted upon. As to the July account, the letter of
712] the 21st *of August was a sufficient giving of time by the company by writing signed by the secretary.

[BRETT, J.: That was an extension of the time of payment after the money had become due and the liability had attached.]

Whether it was before or after the fourteen days makes no difference. But, at all events, as to £118 12*s.* 11*d.*, for the August and September supplies, no time was given. The sureties are clearly liable for those.

[BRETT, J.: Unless they were absolved forever, by reason of time having once been given in a manner not authorized by the agreement.]

In *Skillett* v. *Fletcher* (1), to an action on a bond conditioned for the due performance by A. of his duties as collector of the poor rates and of the sewer rates of the parish of St. A., the bond to continue in force if A. held either office separately, with a breach, that A. received money in both capacities, and failed to pay it once, the defendant (a surety) pleaded that before breach an act was passed increasing A.'s duties as collector of sewer rates, and under which he was also appointed collector of main drainage rates by the persons under whom he held his other appointments,—and it was held on demurrer on the ground that the bond was divisible, and that the plea afforded no answer to the defendant's liability for A.'s breach of duty as collector of poor rates. *Harrison* v. *Seymour* (2) is an authority to the same effect.

A. L. Smith (*Macdonald* and *Grane* with him), showed cause: Here was a binding contract on the 21st of August to give time to Dickinson. The contract in respect of which the defendant consented to be surety was that each month's supply of products should be paid for within fourteen days after the account rendered, unless the company should by writing signed by their secretary allow a longer time for payment. Assuming, but not admitting, that the secretary's letter of the 21st of August was a "writing signed by him" within the meaning of that condition, it was too late, being after the expiration of the fourteen days. The letter itself gave no time: time was given only when the secretary accepted the promissory note and retained it. That disposes of the £115 16*s.* 8*d.* Then, as to the August and Sep-
713] tember accounts **Eyre* v. *Bartrop* (3), cited in Tudor's Leading Cases, 901, is a distinct authority to show

(1) Law Rep., 1 C. P., 217. (2) Law Rep., 1 C. P., 518. (3) 3 Madd., 221.

that the sureties being once discharged from their liability upon the contract, they are absolved altogether.

Grantham was heard in reply.

BRETT, J.: I think the defendant is entitled to retain his judgment, and that this rule should be discharged. The plaintiffs sue him as surety on a bond given to secure the fulfilment by one Dickinson of an agreement entered into between Dickinson and the Croydon Gas Company. The answer set up by the defendant is, that he is absolved from liability as surety on the bond by reason of the plaintiffs having altered to his detriment their position with regard to Dickinson by giving him time. The reply to that on the part of the plaintiffs is, that, if time has been given, it was given in accordance with the terms of their contract with Dickinson; and, further, that, if the defendant is absolved in respect of the £115 16*s.* 8*d.*, the balance of the July account, by reason of what occurred on the 21st of August, yet he is not absolved in respect of the £118 12*s.* 11*d.*, the amount of the August and September supplies, and that the plaintiffs are at all events entitled to recover the latter sum.

Taking into account the secretary's letter of the 21st of August and the promissory note inclosed, which was signed by Dickinson and given back to and held by the company, it seems to me that time was given to Dickinson by the acceptance from him of a promissory note, and that the company did thereby "by writing signed by their secretary allow a longer time for payment" than the time stipulated for. But, although that is so, I think it was not the allowing of time contemplated by the 5th article of the agreement of the 20th of January, 1874, because the time allowed, though by writing, was allowed after the expiration of the first fourteen days of the month. I agree that this contract is to be construed as between Dickinson and the Gas Company, and as if the question arose immediately after its execution. But I cannot agree that the meaning of it is clear. We are bound to look at a business document so as to ascertain what is its business meaning. *Now, the [714 5th article of this agreement is to fix the time at which Dickinson is to be liable for the non-payment of what shall become due from him under his contract, or the amount of credit to be given to him. When you fix that, you fix the time at which the liability of the sureties is to attach for his default. The first moment of time at which Dickinson was to be liable for non-payment of the amount of the previous month's supply was "within the first fourteen days of the ensuing month after the estimate shall be

made." If something be done in the meantime, viz., an extension of the period of credit by a writing signed by the secretary, the time may be enlarged: but, unless that is done, the liability of the surety is to attach upon non-payment by the principal in fourteen days after the account rendered. If once the liability attaches, you cannot afterwards fix a time at which the principal shall become liable. The time can only be altered in one way, viz., by writing signed by the secretary; and that must be before the fourteen days have run out, otherwise there will be two periods of time for the liability to attach. It seems to me that, although this might be an allowance of time within the meaning of the 5th article of the agreement, the allowance was too late, and not authorized by the agreement as between Dickinson and the plaintiffs. That being so, the taking of the promissory note was a giving of time to the principal unauthorized by the agreement; and it has always been held that the giving of time to the principal by a binding contract so alters the position of the surety to his detriment as to absolve him from liability. As to the £115 16*s.* 8*d.*, therefore, I think the sureties were discharged. The question then arises whether, being absolved as to one payment, they are absolved forever.

It seems somewhat strange that there is so little authority to be found upon this subject; but I am inclined to think that the true doctrine is laid down in the case to which we have been referred, of *Eyre* v. *Bartrop* (1). There, the plaintiff joined with his brother in the grant of a redeemable annuity, as a surety for the payment of the same quarterly. The annuity was secured by the demise of real property of the plaintiff's brother and by a bond and 715] *judgment of the plaintiff and his brother. The brother afterwards, by deeds to which the plaintiff was not a party, and without his concurrence, entered into a new arrangement with the assignee of the annuity, whereby it was agreed that he should not sue for the annuity for five years from the date of the deed, or from the death of the grantor's father (which should first happen), and that the annuity should be redeemable on different terms. Sir John Leach, V.C., held that the surety was wholly discharged, and was not entitled merely to be exonerated from liability to the arrears of the annuity during the five years, and refused a motion to dissolve an injunction restraining the assignee of the annuity from proceeding to execution upon the judgment. His honor observed that it could not be denied that

(1) 3 Madd., 221.

if, by any arrangement between the creditor and the debtor, the situation of the surety was altered, he was thereby discharged; but it was said that the situation of the surety was only partially altered during the five years, and that, in respect of the subsequent payments, it remained the same. He was, however, of opinion that the deeds executed without the concurrence of the plaintiff, and the change in the terms of the redemption, had either directly or by their own consequences wholly altered the situation of the surety, and that he was thereby wholly discharged. That being so, the position of the sureties as to the payment due on the 17th of August being changed, they were absolved from liability in respect of any of the subsequently accruing payments.

Two cases have been relied upon as showing that, as the contract was to be fulfilled at different times, the case may be dealt with as if there were different contracts, and, though absolved as to one payment, the sureties may still be liable in respect of the others. Those cases are *Skillett* v. *Fletcher* (1) and *Harrison* v. *Seymour* (2). Those, however, were cases where the sureties undertook to guarantee the fulfilment of separate contracts, and not the fulfilment of one contract at separate times. They afford no authority that, in a case like the present, where there is one contract to be fulfilled at different times, the surety may be absolved as to the one period and still held liable as to the others. In truth, those *cases rather fortify the decision of the Vice-Chan- [716 cellor Leach in *Eyre* v. *Bartrop* (3). I am therefore of opinion that the sureties, being absolved from liability in respect of the July supply, were absolved from liability under the agreement altogether; consequently, there must be judgment for the defendant Pollard, and the rule must be discharged.

GROVE, J.: I am of the same opinion. As to the first point, I should have thought that, if the letter of the 21st of August had been sent and the inclosed promissory note signed and returned to the secretary and received by him before the expiration of the fourteen days, that would have been an allowing of time within the meaning of the fifth article of the agreement. But I think that an allowance of time (so called) given after the expiration of the fourteen days was not what was contemplated by the parties, and therefore not that which Pollard agreed to become surety for. Reading it as it stands, without looking at consequences, the article runs thus,—Dickinson shall pay the

(1) Law Rep., 1 C. P., 217. (2) Law Rep., 1 C. P., 518. (3) 3 Madd., 221.

amount of each month's supply within the first fourteen days of the ensuing month after the account delivered, or within such longer time as the company by writing signed by their secretary shall allow him for that purpose. Is that stipulation complied with by a giving of further time by writing signed by the secretary after the original period fixed for payment has run out? I think not. To give a fair meaning to the words, you must necessarily limit them to a further allowance of time whilst the credit is running. Suppose a whole month had been allowed to elapse without any writing of the secretary, would not that clearly have been a breach of the promise upon the faith of which the defendants consented to become sureties, and so have discharged them? Their liability once gone, it cannot be reimposed by a subsequent writing which condones the allowance of time without writing and seeks to make it equivalent to an allowance in conformity with the agreement. It is within neither the words or the fair meaning of the contract. The whole object, that of tying the debtor to a specific time of pay-
717] ment, is defeated by such a *proceeding. Assuming, therefore, that the letter and the promissory note taken together would be a sufficient allowance of time in writing to satisfy the fifth article of the agreement, they must be given and received before the expiration of the stipulated period of fourteen days. As to the second point, considering the number of bonds with sureties that are daily given, I should have thought that question must have been decided long ago. I think the case of *Eyre* v. *Bartrop* (') is a sufficient authority to warrant us in holding the general view of the law to be, that, when once a surety is relieved from the obligation which he has undertaken, that obligation cannot be renewed by any subsequent act to which he is no party. Any credit given to the principal debtor which may alter the position of the surety absolves the latter from liability. The detriment to the surety may be more or less in the particular case; but of that he is to be the judge. The cases of *Skillett* v. *Fletcher* (') and *Harrison* v. *Seymour* (') are distinguishable on the ground stated by my Brother Brett. Upon both grounds, therefore, I am of opinion that the defendant Pollard is entitled to judgment.

DENMAN, J.: I am of the same opinion. The statement of claim is founded on a supposed liability of the sureties for the non-performance of an agreement of the 20th of January, 1874, between the plaintiffs and Dickinson. In his statement of defence, Pollard sets out the agreement, which

(') 3 Madd., 221. (') Law Rep., 1 C. P., 217. (') Law Rep., 1 C. P., 518.

was made upon the same day as, but before, the execution of the bond sued on. The plaintiffs rely upon the fifth clause of the agreement, which stipulates that the supply of products thereunder shall be estimated on the last day of every month, and that payment for the same shall be made within the first fourteen days of the ensuing month after every estimate shall be so made, "unless the company shall by writing signed by their secretary allow a longer time for payment." Now, I think with my Brother Brett that we are bound to construe that clause as if it were a mere agreement between the company and Dickinson; and, so construing it, I *take it to mean that the payment is to [718 be made within the fourteen days unless within that time an allowance of further time is made in the manner indicated. That is the only construction which any reasonable man could put upon such an agreement as this. That being so in the case which has arisen, there was a sum due under the agreement on the 17th of August, and there had been no writing signed by the secretary allowing further time. Consequently there was then a complete breach of Dickinson's contract. At a subsequent time, the defendants take from Dickinson a promissory note, and thereby suspend their remedy against him for a whole month. The ordinary principle which governs cases of this sort is well laid down in Chitty on Contracts, 10th ed., p. 498, where it is said: "If the creditor gives time to the principal,—that is, if by a new and valid contract between the creditor and the principal, to which the surety does not assent, the period be extended at which, by the contract between them, the principal was originally liable to pay the creditor,—the surety is clearly, as a general rule, freed from responsibility at law and in equity. Thus, in *Coombe* v. *Wolf* (1), it appeared that the defendant guaranteed the payment of the price of porter which was to be delivered to J., the memorandum containing no stipulation as to the term of credit. The custom of the plaintiff was to give six months' credit, and then sometimes to take a bill at two months. The plaintiff, without the defendant's knowledge, allowed three months to elapse after the six months, and then took from J. a promissory note at two months for the debt, thus virtually giving a credit of eleven months; and the court held that the defendant as surety was exonerated, upon the ground that his situation was prejudiced by the plaintiff having precluded himself by taking the note from proceeding during its currency against the principal." That case is exactly like this. I am not

(1) 8 Bing., 156.

aware of any case which decides that the liability of a surety, upon a contract under which payments by the principal are to be made at certain times, is severable to such an extent as that, after time given in respect of one payment, you can sue the surety in respect of subsequent breaches, as to which no time has been given. The cases of 719] *Skillett* *v. *Fletcher* (1) and *Harrison* v. *Seymour* (2) do not bear that out. They proceeded on the ground that the contracts were severable and might be dealt with as if there had been distinct contracts in respect of each of the matters.

Judgment for the defendant Pollard.

Solicitors for plaintiffs: *Prior, Bigg, Church & Adams.*
Solicitor for Dickinson: *S. J. Robinson.*
Solicitor for Pollard: *William Beck.*
Solicitors for Child: *Carey, Warburton & De Paula.*

(1) Law Rep., 1 C. P., 217. (2) Law Rep., 1 C. P., 518.

See 11 Eng. Rep., 41 note; 17 Eng. Rep., 183 note.

[1 Common Pleas Division, 722.]

June 14, 1876.

722] *KEITH and Another v. BURROWS and Another.

Mortgage of Ship—Effect of Non-registration—Merchant Shipping Act, 1854, 17 & 18 *Vict. c.* 104.

Under s. 69 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), the only effect of the omission to register a mortgage of a ship is, to postpone the mortgagee's claim to that of a subsequent mortgagee or transferee whose mortgage or transfer is registered before it. Therefore the non-registration of the mortgage affords no answer to the claim of the first mortgagee to freight earned by the ship as against a purchaser of the cargo without notice of the mortgagee's title.

The mere omission by a person to do something which it is not his duty to do, but which if done would have prevented loss to another, is not sufficient to render such person liable for such loss, or to deprive him of any right which he would otherwise have had against the other.

An unregistered mortgage of a ship passes to the mortgagee the ownership of the ship, as against a subsequent equitable assignment of the freight to a third person,—at all events, in the absence of fraud or such gross and wilful negligence as is equivalent to fraud.

On the 1st of December, 1874, M., the owner of 60/64ths of the ship Stonehouse, then at San Francisco (the captain being owner of the residue), mortgaged his interest to the plaintiffs for £7,500 and further advances. Freights not being obtainable at San Francisco, the captain on the 2d of December procured a shipment of wheat there "on account of the ship," which cargo was consigned to the orders of the shippers, under bills of lading stating the freight payable on delivery to be 1*s.* per ton, and they (the shippers) drew bills on M. for the price at sixty days' sight, which were attached to the bills of lading. The ordinary freight at this time was 55*s.* per ton. On the 4th of January, 1875, the defendants advanced M. £3,000, and on the 22d of February a further sum of £9,000, on the security of the cargo, without no-

tice of the plaintiffs' mortgage,—it being arranged that they should sell the cargo and receive the proceeds on M.'s account. Before carrying out this arrangement with M., the defendants searched the ship's register, and found no registered incumbrance of his interest therein. On the 2d of February, 1875, there was a further mortgage of the ship by M. to the plaintiffs for £4,000 and further advances. On the 26th of February, M. assigned to the defendants the freight of the Stonehouse at 55s. per ton; and on the 2d of March M. further mortgaged his interest in the ship to one H., who registered his mortgage on the 8d of March. The plaintiffs' mortgages were not registered until the 6th of March.

The Stonehouse arrived at Liverpool on the 13th of April, when H. and the plaintiffs took possession of her. H., being satisfied with his security on the ship, did not claim the freight.

On the 19th of February, 1875, the defendants and M. sold the cargo to J. & Co. *on the terms of freight being paid at 55s. per ton; and by subsequent ar- [723
rangement the defendants acquired the rights of J. & Co.:

Held, that H., the first registered mortgagee having abandoned all claim to the freight, the plaintiffs as second mortgagees were entitled to claim it as against the defendants.

ACTION by the plaintiffs who claimed as mortgagees in possession of the ship Stonehouse to be entitled to freight in respect of a cargo of wheat. The following case was stated for the opinion of the court:—

1. The plaintiffs are merchants carrying on business under the style or firm of James Wyllie & Co., in London. The defendants are corn-factors and brokers carrying on business under the style or firm of Burrows & Perks, in London. The action is brought by the plaintiffs who claim, as mortgagees in possession of the ship Stonehouse, to recover moneys alleged to have become due and payable in respect of freight from the defendants under the circumstances hereinafter appearing.

2. Mr. John Morison of Billiter Street, trading under the style or firm of John Morison & Co., was during the period covered by this case the registered owner of 60/64ths of the Stonehouse; Mr. Bley, the captain, being the registered owner of the remaining 4/64ths.

3. On the 1st of December, 1874, Morison executed a mortgage of his 60/64ths of the ship in favor of the plaintiffs to secure £7,500 and interest in account current, and any further sum which might become due.

4. The Stonehouse was at this time at San Francisco seeking employment, and, the freight market being disorganized owing to a recent commercial failure, her captain, Bley, determined, rather than accept the low offers of freight which were being made in the thick of the crisis, to load a cargo of wheat "on account of the ship," hoping by its sale in England to realize a better margin than what was available as freight at the port of loading.

5. Accordingly, a cargo of 23,644 sacks of wheat (being the cargo in respect of which the present claim arises) was

obtained through Messrs. Parrott & Co., merchants at San Francisco, and shipped on board the Stonehouse. The invoice, dated the 2d of December, 1874, stated that the wheat
724] was shipped by Parrott & Co. on *board the Stonehouse, bound to Falmouth or Downs for orders, consigned to order, that is, to the order of Parrott & Co. (they thus keeping control over the cargo until the money found by them for the purchase thereof should be paid), by order of John Morison & Co., for account and risk of whom it might concern.

6. Bills of lading were made out for the wheat, deliverable to the order of and were handed to Parrott & Co., stating the freight payable on delivery to be 1*s.* per ton. Parrott & Co. simultaneously drew bills of exchange on Morison at 60 days' sight against the wheat, to recoup themselves for the price of the wheat and their commission, and sold the bills of exchange with three bills of lading indorsed by Parrott & Co. attached thereto, to the bank of British North America.

7. It is a common practice in many places for foreign shippers, when a cargo is to be shipped "for the account of the ship," to draw bills of lading for a nominal instead of a blank freight, there being an opinion among merchants that a blank freight is not a desirable thing.

8. On or about the 3d of December, 1874, the Stonehouse sailed from San Francisco. The rate of freight general at this date at San Francisco was only 55*s.* per ton; but the plaintiffs were informed by Morison that they would receive £5,000 to £6,000 for the freight of the Stonehouse. The defendants, however, did not know that Morison had given the plaintiffs any information on the subject, or that they had any interest in the ship.

9. On the 21st of December, 1874, Morison accepted the bills of exchange payable at the London and County Bank on the 22d of February, 1875.

10. On the 1st of January, 1875, Morison effected two policies of insurance in respect of the Stonehouse, on freight valued at £4,000 and £1,000 respectively.

11. The sum necessary to meet the bills of exchange at maturity was £10,364 19*s.* 4*d.*; and at some time in December or the beginning of January, it had been arranged between Morison and the defendants that the defendants should advance to Morison the moneys necessary for the purpose, that the defendants in return should be at liberty to sell the cargo and receive the proceeds of sale on Morison's account, and that the bills of lading and policies
725] *of insurance should be deposited with the defendants as security for their advances.

12. Before making and carrying out this arrangement with Morison, the defendants searched the ship's register at the Custom House, and found that 60/64ths were registered in Morison's name, and that there was no incumbrance whatever on the register. The defendants had no notice in any way that Morison had mortgaged his shares in the Stonehouse.

13. On the 4th of January, 1875, the defendants advanced to Morison £3,000 and shortly afterwards, in pursuance of the arrangements then made, received from him the former of the two policies, being the policy on freight valued at £4,000.

14. On the 2d of February, 1875, Morison executed another mortgage in similar terms of his interest in the ship to the plaintiffs, to secure £4,000 and further advances. Morison subsequently, on the 2d of March, 1875, further mortgaged his interest in the Stonehouse to Joseph Harrold, who registered his mortgage on the 3d of March, 1875, and thus became the first mortgagee, the plaintiffs not having registered their mortgages until the 6th of March, 1875, as hereinafter mentioned.

15. On or about the 16th of February, 1875, the defendants offered the cargo of wheat for sale to divers persons on cost freight and insurance terms, but did not succeed in obtaining a purchaser until on the 19th of February they effected a sale of the cargo on the terms hereinafter appearing.

16. On the 19th of February, 1875, the defendants, on behalf of Morison, and on their own account to the extent of their advances, sold the cargo to Henry Jump & Sons, of Liverpool. The following is a copy of the contract signed by Harris, Brothers & Co., brokers, on behalf of the buyers:—

"London, 19th February, 1875.

"Bought of Messrs. John Morison & Co. through Messrs. Burrows & Perks, for Messrs. Henry Jump and Sons, Liverpool, a cargo of Californian wheat of fair average quality of the season's shipments when shipped.

"Shipped per Stonehouse 1st class from San Francisco. Bill of lading dated about 2d December, 1874, say 23,644 bags, containing 3,089,775 lbs., at the price of 43*s*. 6*d*. per quarter of 500 lbs. shipped; bags weighed and paid for as wheat; including freight and insurance to any safe port in the United Kingdom of Great Britain and Ireland, calling at Falmouth or the Downs for orders. Vessel to discharge afloat. No charge for dunnage or bags. Payment, cash in

726] *London within seven days, less discount for unexpired portion of two months from this date at 5 per cent. per annum in exchange for bill of lading and policies of insurance (free of war risk) effected with approved underwriters, but for whose solvency sellers are not responsible. Damage by sea water or otherwise (if any) to be taken as sound.

"Invoice quantity is to be final. Sellers to pay our brokerage of half per cent. contract cancelled or not cancelled. Any average incurred before this date to be for account of and settled by sellers. Sellers to give policies of insurance for 2 per cent. over the invoice amount including the ½ per cent., and any amount over this to be for sellers' account: three days for awaiting orders at port of call. To discharge according to the custom of the port. Should any dispute arise, it is agreed by buyer and seller to leave the same to be settled by two London corn-factors respectively chosen, with power to call in an umpire, whose decision is to be final.

"As cargo is coming on ship's account, freight is to be computed at 55*s.* per ton of 2,240 lbs., and invoice to be rendered accordingly. Harris, Brothers & Co., Brokers."

17. The defendants would have had a difficulty in disposing of the cargo without allowing an amount equivalent to freight to remain unpaid until the vessel's arrival, and would not have obtained so large a price for it.

18. In accordance with the above contract an invoice was subsequently made out by Morison, of which the following is a copy :—

"Invoice of cargo wheat per Stonehouse @ San Francisco sold to Messrs. Henry Jump & Sons, Liverpool, as per contract of 19th February, 1875.

	£	*s.*	*d.*
23,644 sacks wheat, weighing 3,089,775 lbs.— 6,179$\frac{775}{1000}$ qrs., at 43*s.* 6*d.* per 500 lbs. .	13,440	10	5
Freight on tons 1,379 : 7 : 1 : 3 55*s.* per 2,240 lbs.	3,793	5	0
	9,647	5	5
Brokerage, ½ per cent.	67	4	0
	9,580	1	5
Interest from 26 Feb. to 19 April, 52 days, at 5%	68	4	10
	£9,511	16	7

London, 22d Feb., 1875. Burrows & Perks."

19. On the 22d of February, 1875, Morison obtained a further advance from the defendants of £9,000, making with the sum of £3,000 previously advanced the sum of £12,000. With such advance he paid the said bills of exchange at maturity, and received the bills of exchange and the bills of lading thereto *attached from the London and [727 County Bank, as arranged with the defendants.

20. On the 23d of February, 1875, in pursuance of such last-mentioned arrangement, Morison handed the bills of exchange with the three bills of lading attached to the defendants, and the following memorandum was indorsed on the bills of lading and signed by Morison:—

"We assign our interest in the within freight to Messrs. Burrows & Perks, London, whose receipt, or that of their appointed agent, will be sufficient discharge.

"The freight assigned is at the rate of 55*s.* per ton, and not the nominal amount of 1*s.* per ton.

"J. Morrison & Co.
24/2/75."

Such indorsement, although dated the 24th of February, 1875, was not really made and signed until about the 26th of February.

21. At the same time Morison handed to the defendants the aforesaid invoice made out in pursuance of the contract with Messrs. H. Jump & Sons for transmission to the buyers, together with a letter to the defendants themselves dated the 25th of February, 1875, and inclosing the policies therein referred to, which letter was as follows:—

"21 Billiter Street, 25th Feb., 1875.

"Messrs. Burrows & Perks,

"Dear Sirs,—We further give you in security policy of insurance on wheat £1,500 and on freights £1,000, both in the Stonehouse. Should this vessel be lost, we trust you will give us the collection on them as well as on the former policies. J. Morison & Co."

Both of the above policies are in the Marine Insurance Company.

22. The invoice was duly forwarded by the defendants to H. Jump and Sons, who thereupon paid the balance thereon appearing of £9,511 16*s.* 7*d.* in pursuance of their contract. The cargo was subsequently resold by Jump & Sons to Ross T. Smythe & Co., of Liverpool.

23. On the 6th of March, 1875, the plaintiffs duly registered their mortgages.

24. On the 13th of April, 1875, the Stonehouse arrived at

Falmouth for orders. She was then taken possession of by Mr. Harrold and the plaintiffs as first and second mort-
728] gagees respectively. *Mr. Harrold's debt being more than secured by the ship, he laid no claim to the freight. The Stonehouse proceeded in the possession of Harrold and the plaintiffs to Liverpool, where she arrived on the 19th of April, 1875, on which day Messrs. Lowless & Co., on behalf of the defendants, wrote a letter to the plaintiffs' attorneys, Messrs. Freshfields & Williams, as follows:—

"Dear Sirs,—We have a telegram that this vessel (Stonehouse) is now off the port and that the market is a falling one. Should there, therefore, be any difficulty in obtaining delivery, the purchasers may repudiate their bargain, and a loss of £1,000 might easily be sustained, in addition to the charges for landing and warehousing. Will you, therefore, please let us have your determination instantly. We are obliged to give you notice that our clients will seek to recover all damages sustained from Messrs. Wyllie & Co.; and we have given you special notice of the circumstances, in order that our clients may be entitled to recover. We hope, however, that there will be no necessity for this.

"Lowless & Co."

25. The plaintiffs refused to allow Messrs. Ross T. Smythe & Co. to take delivery of the cargo, except on payment of freight at 55*s*. per ton, and were prepared to protect themselves in the manner indicated in the Merchant Shipping Amendment Act, 1862; but, to avoid such detention of the cargo, and the deterioration and expenses which would have been the result of it, the following agreement was made between the plaintiffs and the defendants, through their respective attorneys:—

"It is hereby agreed between Messrs. Freshfields & Williams, as representing Messrs. James Wyllie & Co., and Messrs. Lowless & Co., as representing Messrs. Burrows & Perks, that £3,500, being the amount of freight on the cargo of the ship Stonehouse claimed by Messrs. James Wyllie & Co. as second mortgagees in possession of the Stonehouse, shall be paid into the London and Westminster Bank in the joint names of Messrs. Freshfields & Williams and Messrs. Lowless & Co., to abide the result of an action to be brought by Messrs. James Wyllie & Co., against Messrs. Burrows & Perks, who hereby admit, for the purposes of the action, that they are the owners of the cargo under the bill of lading thereof, and liable to pay whatever freight may be

due thereon. The action to be commenced within thirty days from this date, and duly prosecuted. In the event of no action being brought within the time aforesaid, or of Messrs. James Wyllie & Co. not obtaining a verdict in the said action, the amount so deposited, with any interest thereon, is to be paid to Messrs. Burrows & Perks or order; and, in the event of Messrs. James Wyllie & Co. recovering a verdict for the said sum of £3,500, or any part thereof, the amount of such verdict is to be paid to them or order out of the sum deposited, and the balance (if any) to Messrs. Burrows & Perks or order.

"It is admitted, for the purposes of the said action, that the amount of freight specified in the bill or bills of lading has been tendered. Messrs. James Wyllie & Co. to withdraw any stop which they may have put upon the goods on the *money being deposited. Messrs. Burrows & [729 Perks to have the same right of recovering interest on the sum to be deposited as if the money had been paid at the proper time into a wharfinger's hands under the provisions of the Merchant Shipping Amendment Act, Dated 19th April, 1875.

"Freshfields & Williams.
"Lowless & Co."

26. It was subsequently found that freight at 55*s.* per ton amounted to £3,577 5*s.* 7*d.*, and upon the execution of the agreement and the payment of the £3,577 5*s.* 7*d.*, as subsequently agreed, instead of £3,500, into the London and Westminster Bank, the plaintiffs gave delivery of the cargo.

The question for the opinion of the court (who were to have liberty to draw all inferences of fact), was, whether the plaintiffs were entitled to refuse delivery except on payment of freight at the rate of 55*s.* per ton, or whether any freight was due on the said cargo beyond freight at the rate of 1*s.* per ton. If the opinion of the court on either point should be in the affirmative, judgment was to be entered for the plaintiffs for £3,577 5*s.* 7*d.*, with costs; if in the negative, for the defendants.

The case was argued on the 10th and 21st of February last, by *Thesiger*, Q.C., and *Webster*, for the plaintiffs, and by *Herschell*, Q.C., and *C. S. Bowen*, for the defendants. The arguments and the authorities cited are fully noticed in the judgment.

Cur. adv. vult.

June 14. The judgment of the court (Brett, Archibald, and Lindley, JJ.) was delivered by

LINDLEY, J.: The material facts are these: December 1st, 1874, mortgage by Morison to plaintiffs of a ship (i.e., 60/64ths, but nothing turns on this) for £7,500 and further advances. January 4th, 1875, the defendants advanced Morison £3,000 on security of cargo, without notice of the plaintiffs' mortgage. February 2d, 1875, Morison again mortgaged the ship to the plaintiffs for £4,000 and further advances. February 19th, 1875, sale of cargo by defendants and Morison to Jump & Sons on terms of freight being paid at 55*s.* a ton. February 22d, 1875, further advance by the defendants of £9,000. February 26th, 1875, assignment to them (defendants) of the freight at 55*s.* per ton, as security
730] *for their advances. March 2d, 1875, Morison mortgaged the ship to Harrold. March 3d, 1875, Harrold's mortgage was registered. March 6th, 1875, plaintiffs registered their mortgage. April 13th, 1875, the ship arrived, and Harrold and the plaintiffs took possession. Harrold, being satisfied with his security on the ship, did not claim the freight. An arrangement was come to by which the defendants acquired Jump & Sons' rights.

Consider first how the case would have stood if there had been no mortgage to Harrold. Two questions would then have arisen,—1. Would the freight payable to the plaintiffs as first mortgagees in possession have been 55*s.* per ton, or only 1*s.*? 2. Would the plaintiffs have been entitled to this freight as against the defendants?

1. With respect to the first of these questions, it is to be observed that, although a nominal freight of 1*s.* was made payable by the bills of lading, the cargo being bought for the owner of the ship, yet in the contract with Jump & Sons the freight payable is agreed to be 55*s.* per ton, and the freight assigned to the defendants is likewise freight at 55*s.* The defendants therefore, whether they claim through Jump & Sons or under the assignment to themselves, are not in a position to deny that the sum payable as and for freight was to be 55*s.* per ton. It is true that this sum was not made payable when the cargo was put on board, nor when the defendants made their first advances on the cargo; and that it was made payable by an agreement entered into by the shipowner and the defendants and the purchasers of the cargo after the date of the plaintiffs' mortgage. But there is no reason why the benefit of this agreement should not accrue to the mortgagee of the ship on his taking possession of her. On taking such possession, he is entitled to all freight payable under charterparties or bills of lading; and there is no difference (material to the present case) be-

tween freight payable under such documents as these and money payable as and for freight under such an agreement as that which has here to be considered. No authority on this point was referred to on either side; and, on principle, 55*s.* having been fixed by all parties interested in the cargo to be the freight, must be so treated for all the purposes of the case.

*2. The question whether the plaintiffs as mort- [731
gagees of the ship or the defendants as assignees of the freight would have had the better title to it, but for the mortgage to Harrold, turns on the true nature of a mortgage of a ship and on the effect of the omission of the plaintiffs to register their mortgage before the freight was assigned to the defendants.

The mortgage to the plaintiffs was in the statutory form, and by it the ship was "mortgaged" to them. The word "mortgage" is a well-known word, and signifies a transfer of property by way of security: see 2 Bl. Com., 158; Termes de la Ley, Mortgage. A mortgage is a transfer of all the mortgagor's interest in the thing mortgaged: but such transfer is not absolute; it is made only by way of security; or, in other words, it is subject to redemption. Unless, therefore, there is any statutory enactment to the contrary, and so far as there is no enactment to the contrary, the plaintiffs in this case acquired by their mortgage the whole of the mortgagor's interest in the ship, or, in other words, the legal title to the ship as a security.

Such is *prima facie* the effect of the instrument of mortgage. But the statutes relating to ships must be examined with a view to determine what the consequences of registering or not registering may be.

Under the older statutes relating to merchant shipping, all transfers and mortgages were made by a bill of sale; and such bill of sale had no effect whatever, either at law or in equity, until registration: see the cases collected in *Liverpool Borough Bank* v. *Turner* (1); Maclachlan on Shipping, 2d ed., p. 39.

The Merchant Shipping Acts now in force, however, make a marked distinction between transfers of ships (otherwise than by way of security) and mortgages: and there are different groups of sections with distinct headings applicable to these two different subjects: see 17 & 18 Vict. c. 104, ss. 55–65, which relate to transfers and transmissions, and ss. 66–75, which relate to mortgages. Amongst other distinctions between these two modes of dealing with ships, the following are the most noteworthy: A transfer (otherwise

(1) 1 J. & H., 159; 2 D. F. & J., 502.

732] than by way of mortgage) must be by a bill of *sale (s. 55), and must be produced to the registrar for registration (s. 57); and the transferee (if not a corporation) must make a declaration that he is a natural-born subject: see s. 56, and sched. F.

On the other hand, a mortgage must be by a different kind of instrument (s. 66); and there is no enactment requiring such instrument to be produced to the registrar (compare s. 66 with s. 57); and the mortgagee is not required to make any declaration as to his nationality.

It is true that, in the *Liverpool Borough Bank* v. *Turner* (1), V.C. Wood and Lord Campbell held that an unregistered equitable mortgage of a ship could not be enforced; but in consequence of this decision, the 25 & 26 Vict. c. 63, s. 3, was passed; and the validity of an unregistered mortgage, as against all persons except registered transferees or mortgagees (see ss. 43 and 69 of the Merchant Shipping Act, 1854), can hardly now be disputed: see *Stapleton* v. *Haymen* (2).

It appears from the Merchant Shipping Act, 1854, itself that a mortgagee has an interest in the ship capable of transmission by bankruptcy, death, or marriage (s. 74); and that on payment off of the debt secured by a registered mortgage, and entry of payment in the registry, the estate if any which passed to the mortgagee vests in the person in whom the same would have vested if the mortgage had not been made: s. 68.

The mortgagee, however, is not to be deemed the owner of the ship, except so far as may be necessary for making her a security for the mortgage debt (s. 70). This section was inserted for his protection against liabilities which might have attached to him by reason of his interest in the ship; see *Dickinson* v. *Kitchen* (3); and would have been quite unnecessary if the mortgage transferred no interest in the sense of ownership in her to him; or, in other words, if it created a mere charge on her in his favor.

Sect. 72, which protects registered mortgagees of ships from the operation of the reputed ownership clauses of the Bankruptcy Acts, would also be unnecessary if a mortgagee 733] had not such an *interest in the ship as might render him her true owner within the meaning of those clauses.

Again, the right of a first registered mortgagee to take possession of the ship is too well settled to be capable of dispute; but the statute confers no such right in express terms; and it only exists by reason of the ownership trans-

(1) 1 J. & H., 159; 2 D. F. & J., 502. (2) 2 H. & C., 918; 33 L. J. (Ex.), 170.
(3) 8 E. & B., 789.

ferred to the mortgagee by the mortgage itself. A mere charge would confer no such right: see Fisher on Mortgages, 197. But, as a mortgagee, unless in possession, would have no power of sale if it were not expressly conferred upon him, and as the statutory form of mortgage contains no such power, the statute itself expressly confers it on registered mortgagees: s. 71. This, however, affords no argument against the view that the mortgage itself confers on the mortgagee an interest in the sense of ownership in the ship herself.

The conclusion, then, to be drawn from the mortgage and the statute, is, that the mortgagee of a ship, like the mortgagee of any other property, acquires an ownership in the ship, viz., such ownership as the mortgagor has to give. A first mortgagee will thus acquire the whole ownership in the ship, but only of course as a security for his money. Second and other mortgagees will only acquire the interest left in the mortgagor, or, in other words, his right to redeem. That right will be legal or equitable, according as the time for paying off the first mortgage has not yet arrived or has passed.

That this is the true nature of a mortgage of a ship appears not only from the above observations, but also from the following decisions,—*Dickinson* v. *Kitchen* (1) and *Liverpool Marine Credit Co.* v. *Wilson* (2).

The plaintiffs in this case having acquired by their mortgage the ownership of the ship, and that title being prior in point of date to the equitable assignment of the freight to the defendants, such title must prevail against the latter, unless there be some sufficient reason to the contrary: see *Rice* v. *Rice* (3). The only reason alleged is, the non-registration of the plaintiffs' mortgage before the date of the assignment to the defendants. If an unregistered mortgage of a ship were null and void, or if it had no *legal [734 effect before the time of registration, then the title of the plaintiffs would have accrued after that of the defendants, and would have to be postponed to theirs: see *Lindsay* v. *Gibbs* (4). But the present Merchant Shipping Acts contain no enactment to this effect; and, as already observed, an unregistered mortgage is not now void. Moreover, s. 69 of the act of 1854 enacts in effect that, if there is more than one registered mortgage, the mortgagees shall be entitled in priority one over the other according to the dates of registration. So far, therefore, as the act itself is concerned,

(1) 8 E. & B., 789.
(2) Law Rep., 7 Ch., 507.
(3) 2 Drew., 73.
(4) 22 Beav., 522.

the only consequence of not registering a mortgage is to postpone it to a subsequent mortgage or transfer which is registered before it (see s. 43).

But it was contended that, upon general principles of equity, and apart from any statutory enactment, the plaintiffs had lost their priority by reason of their own negligence in omitting to register their mortgage. The case states that the defendants searched the register before they advanced their money on the freight, and they were therefore really misled by the non-registration of the plaintiffs' security: and it is contended that this is one of those cases which ought to be decided according to the rule that, whenever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. This rule is a well-known rule both at law and in equity; but it is one by no means easy of application, owing to the ambiguity of the word "enabled." The plaintiffs did not register their mortgage; but they were not themselves party or privy to any fraud on the defendants. The plaintiffs did not know that money was being obtained on the security of the freight; and, in truth, there is nothing save the mere omission to register which can be urged against them. But the mere omission by a person to do something which it is not his duty to do, but which if done would have prevented loss to another, is not sufficient to render such person liable for such loss, nor to deprive him of any right which he would otherwise have had against that other. There are decisions to this effect both at law and in equity: see at law, *Arnold* v. *The Cheque Bank* (1), decided by this court during the last sittings, where the 735] cases at law were fully *considered. In equity, it is well settled now that the mere omission by a first mortgagee to obtain the title deeds from the mortgagor is not sufficient to postpone the first mortgage in favor of a subsequent mortgagee who *bona fide* advances his money in the belief that the property is unincumbered, and who obtains the deeds: see *Evans* v. *Bicknell* (2); *Hewitt* v. *Loosemore* (3). To postpone the first mortgage in such cases, there must be either fraud or such gross and wilful negligence as is equivalent to it.

In the present case, but for Harrold's mortgage the plaintiffs would have had a clear prior legal title to the freight as against the defendants: and although, if the plaintiffs had registered their mortgage when it was made, the defendants would not have been misled, there is no fraud, nor

(1) Ante, p., 578. (2) 6 Ves. 174, 188. (3) 9 Hare, 449.

such gross and wilful negligence imputable to the plaintiffs as is sufficient to deprive them of their prior legal rights.

3. It remains to consider the effect of Harrold's mortgage. This, although subsequent in point of date to the plaintiffs' mortgage, was registered before it, and by s. 69 of 17 & 18 Vict. c. 104 became entitled to priority over it. By reason of this statutory priority Harrold became first mortgagee of the ship, and became entitled to take possession of her and to receive her freight. Having paid himself, he would hold any surplus for the benefit of the subsequent incumbrancers according to their priorities. In point of fact, Harrold was content to look to the ship only, and he laid no claim to the freight. But the plaintiffs had also taken possession of the ship; and they claim the freight as second mortgagees. The priority gained by Harrold cannot affect the rights of the plaintiffs as against the defendants; and, Harrold's claims being satisfied, his mortgage may for all present purposes be disregarded. The mortgage of the plaintiffs became, as between them and Harrold, a second mortgage instead of a first mortgage; but the plaintiffs' mortgage continued to be, as it always was, prior in point of date to the assignment to the defendants. Even, therefore, if the plaintiffs' mortgage became, for all purposes, and as against all persons, an equitable as distinguished from a legal mortgage, its priority in point of date remained unaffected. It was, indeed, contended that, by reason of Harrold's mortgage and *its priority over the plaintiffs' mortgage, [736 this last could only be regarded as an equitable mortgage dating from the time of its registration. But this contention is based upon the erroneous supposition that an unregistered mortgage has no validity until it is registered.

It was further contended that the plaintiffs, having become second mortgagees, had no right to take possession of the ship, and that their right to freight was never therefore perfected. But, although a second mortgagee has no legal as distinguished from equitable right to possession, and although he cannot take possession as against a first mortgagee, yet, as against all other persons, he has a right to take possession, and can enforce such right, if necessary, by obtaining the appointment of a receiver: see *Liverpool Marine Credit Co.* v. *Wilson* (1), where the rights of a second mortgagee of a ship are pointed out. In this particular case, the plaintiffs took possession; and it was therefore unnecessary to apply for a receiver. If they had neither taken possession nor applied for a receiver, still, as the first

(1) Law Rep., 7 Ch., 511.

mortgagee did take possession, it was probably unnecessary for the plaintiffs to do more than give him notice of their claim; for, he would, after paying himself, hold all surplus moneys received by him in trust for the person beneficially interested in them, according to their priorities.

For these reasons our judgment is for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Freshfields & Williams.*
Solicitors for defendants: *Lowless & Co.*

[1 Common Pleas Division, 737.]

June 14, 1876.

737] *French and Another v. Gerber and Others.

Shipping—Construction of Charterparty—Proviso for Cesser of Liability of the Charterers—Demurrage—Lien for Freight.

The defendants chartered a ship to carry a cargo of rice from Akyab to a "good and safe port" in the United Kingdom, &c., calling at Queenstown or Falmouth for orders, which were to be forwarded within forty-eight hours after notice of her arrival. The charterparty contained the following clause,—"It is further agreed that the liability of the charterers shall cease as soon as the cargo is on board, provided the same is worth the freight at port of discharge; but the owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage, which they shall be bound to exercise."

In an action against the charterers (who had sold the cargo before arrival) two breaches were assigned,—1, that the defendants or their agents failed to give orders as to the ship's port of discharge,—2, that they gave orders for the ship to discharge at a port which was not a "good and safe port" within the meaning of the charterparty; whereby the plaintiffs were delayed and put to expense in obtaining payment of the freight:

Held, on demurrer, that the above clause discharged the charterers from all liability for acts and defaults of themselves or their agents happening after as well as before the ship was loaded, whether covered by the owners' lien or not.

DECLARATION that the plaintiffs, by the master of the Theresa, and the defendants, by Burot, Gerber & Co., their agents at Akyab, entered into a charterparty in the words and figures following:—

"Akyab, 8th April, 1874.

"It is this day mutually agreed between Mr. R. C. Downie, in command of the good ship or vessel called the Theresa, classed A. 1 until end of 1874, under British colors, whereof *pro tem.* R. C. Downie is master, of the measurement of 705 tons or thereabouts, now off Akyab, and Messrs. Burot, Gerber & Co., of Akyab, merchants and freighters, that the said ship, being copper sheathed or yellow metalled, tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed sail and proceed to a loading berth in the port of Akyab, or so near thereunto as she may

safely get, always afloat, and there, having discharged her cargo or ballast, and being copper sheathed or yellow metalled, tight, &c., load from the agents of the freighters, who may direct the ship to the most convenient safe anchorage, a full and complete cargo of cargo rice in bags as usual, which the freighters bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and, being so loaded, shall therewith proceed with all dispatch to Queenstown or Falmouth (at the option of the master) for orders, to be forwarded within forty-eight hours after notice of said arrival has been given to and received by charterers' agents in London or lay days to count, to discharge at a good and safe port in the United Kingdom or on the Continent between Bourdeaux and Hamburg, both inclusive, or so near thereunto as she may safely get, and deliver the same in any dock freighters may appoint, always afloat, agreeably to bills of lading, on being paid freight in full of all port charges, *pilotage, and primage, at and after the rate [738 of 60*s.* sterling per ton of 20 cwt. net delivered; the act of God, restraints of princes and rulers, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage always excepted. The freight to be paid on right delivery of the cargo, if at a port in the United Kingdom, in cash two months from the vessel's report inwards at the Custom House, or under discount at the rate of 5 per cent. per annum, at freighters' option; and, if on the Continent, on unloading and right delivery of the cargo, in cash at the exchange of the day, less two months' discount at the rate of 5 per cent. per annum. Twelve working laying days (Sundays excepted) are to be allowed the freighters for loading the said ship at port of loading and waiting for orders at port of call in Europe, to commence and to be computed twenty-four hours after the master has given notice in writing to charterers' agents that the ship is ready to receive cargo; and fifteen days on demurrage are allowed over and above the said laying days at 4*d.* per register ton per day. The homeward cargo to be received, when the vessel is at her place of discharge, with all possible dispatch and according to the custom of the port. All goods to be brought to and taken from alongside at the expense and risk of the freighters. The captain to sign bills of lading for his cargo at no lower rate of freight than stipulated in this charterparty; failing which, charterers shall not be responsible for such difference. The vessel to be con-

signed at ports of loading and discharge to charterers' agents free of commission under this charterparty. All questions of general average to be settled according to the custom of the London underwriters at Lloyds. Freighters to have the power of underletting the whole or part of the vessel.

"Freighters to have the option of cancelling this charterparty if the vessel be not arrived at port of loading and be ready to take in cargo at or before noon of the 15th of April next ensuing retaining consignment; such option to be availed of within twenty-four hours after ship's arrival. It is further agreed that the liability of the charterers shall cease as soon as the cargo is on board, provided the same is worth the freight at port of discharge, but the owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage, which they shall be bound to exercise: sufficient cash for ship's ordinary disbursements to be advanced the master by freighters' agents at port of loading, at the current rate of exchange, to the extent of £600, for the due appropriation of which freighters shall not be responsible: such advance to be on account of chartered freight, and to be indorsed on bills of lading, including cost of insurance and 2½ per cent. commission, and deducted from freight on settlement thereof. . . . . Penalty for non-performance of this agreement, estimated amount of chartered freight. A commission of 5 per cent. is due by the owners (ship lost or not lost) to Burot, Gerber & Co., on signment of this charterparty; and the vessel is to be consigned to them, should she return to London, or to their agents if to any other port of discharge. £20 gratuity to the master, provided the cargo is not delivered heated nor more than 3 per cent. thereof sea-damaged."

Averment, that the Theresa was loaded with a cargo of rice, and sailed to Falmouth; and that, on her arrival there, due notice of such arrival was given to and received by the defendants and their agents, and all times elapsed, all things happened, and all conditions were fulfilled to entitle
739] the plaintiffs to have orders for the *Theresa to proceed to port of discharge given by the defendants or their agents, in accordance with the terms of the said charterparty: yet the defendants or their agents did not give and refused to give any orders as to the Theresa's port of discharge, in accordance with the terms of the charterparty; whereby and in consequence whereof the plaintiffs were delayed, prevented, and hindered from earning the freight on the Theresa's cargo payable under the charterparty, and

incurred divers expenses in and about the unloading of the said cargo, and in endeavoring to obtain and in obtaining payment of the said freight.

There was a second count, alleging for breach "that the defendants or their agents did not give orders for the Theresa's port of discharge in accordance with the terms of the charterparty; and gave orders that the Theresa should proceed to and discharge at a port which was not a good and safe port within the meaning of the said charterparty, and where and as near whereunto as she could safely get she could not deliver the said cargo always afloat, or in any dock always afloat, according to the terms of the said charterparty;" whereby, &c. (as before).

There was also a count for money paid, money had and received, &c.

Fifth plea, that the charterparty was made subject to the condition therein contained that the liability of the defendants should cease as soon as the cargo was on board, provided the same was worth the freight at port of discharge, but the owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage, which they should be bound to exercise; that the cargo was shipped on board the said vessel, and before the arrival of the same was sold by the defendants; that the same was worth the freight at the port of discharge; and that by reason of the premises the defendants' liability upon and under the charterparty ceased.

Sixth plea, similar to the fifth, but adding that "the alleged breaches were caused by the acts of the buyers of the cargo, and not by the acts of the defendants."

Demurrer, on the ground that the facts stated in the pleas did not affect the defendants' liability under the charterparty. Joinder.

*Feb. 17. *French*, for the plaintiffs: It may be [740 conceded that, if this had been an action for freight, dead freight, or demurrage, the fifth and sixth pleas would have been good answers. But the breaches here are different from those in *Kish* v. *Cory* (1). The breach alleged in the first count is, for not giving orders as to the port of discharge of the Theresa, whereby the plaintiffs were delayed and prevented from earning freight, and incurred expense in unloading the cargo and in obtaining payment of the freight; and that in the second count is, that the orders given were not in accordance with the terms of the charterparty, but were orders that the ship should proceed to a

(1) Law Rep., 10 Q. B., 553.

port which was not a good and safe port, whereby the plaintiffs were put to expense in earning the freight. Under the clause in question, the cesser of the charterer's liability is conditional and coextensive only with the lien given. The sale by the defendants of the cargo without notice to the plaintiffs did not relieve them of their liability to give orders for the ship's port of discharge; there being no agreement express or implied between the plaintiffs and the defendants that the liability of the latter to give such orders should cease on their selling the cargo, or that the buyers' liability should be accepted in substitution. See, as to the measure of damages for refusing or neglecting to name a safe port, *Stewart* v. *Rogerson* (1).

Watkins Williams, Q.C., for the defendants: Delay or refusal to name a port of delivery comes strictly within the demurrage clause. Under such a clause as that in question, *all* liability of the charterer ceases on the cargo being loaded, as well in respect of future as in respect of antecedent liabilities, without regard to lien.

French was heard in reply.

Cur. adv. vult.

June 14. The judgment of the court (Brett, Archibald and Lindley, JJ.) was delivered by

BRETT, J.: In this case the judgment of the court is to be given upon a record on which there are demurrers to two pleas, the fifth and sixth. We cannot doubt that, if the declaration is good, the pleas are bad. If the stipulation in the charterparty does not of itself upon the loading of 741] the cargo absolve the defendants *in respect of the breaches relied on in the declaration, the other facts set forth in the pleas respectively cannot absolve them. The defendants are bound by the contract unless they are absolved by the contract. The real question, therefore, in this case is, whether the declaration is sufficient.

The material points to be noticed seem to be, that the defendants must be assumed to be the real freighters, that there is an implied contract by them that orders shall be forwarded to Queenstown or Falmouth, that time for the waiting of the ship for such orders is expressly allowed in the lay days, and that beyond the lay days, which include such waiting and the period of loading at the port of loading, fifteen days on demurrage are allowed at 4*d.* per register ton per day. The homeward cargo is to be received when the vessel is at her place of discharge with all possible dispatch and according to the custom of the port.

(1) Law Rep., 6 C. P., 424.

The breach in the first count is, for not giving any orders as to the port of discharge, whereby and in consequence whereof the plaintiffs were delayed, prevented and hindered from earning the freight on the cargo payable under the charterparty, and incurred divers expenses in and about the unloading of the said cargo, and in endeavoring to obtain, and *in obtaining* payment of the said freight. The breach in the second count is, that the orders given were not in accordance with the terms of the charterparty, but were orders that the Theresa should proceed to and discharge at a port which was not a good and safe port within the meaning of the said charterparty, whereby &c. (the same consequences as in the first count).

The real grievance, then, complained of is, not that the plaintiffs did not earn the freight, but that they were delayed and put to expense in earning it by reason of two alleged breaches of the charterparty occurring at Falmouth. Even though the mere delay of the ship by not giving orders at Falmouth might be treated as subject to the demurrage rate, and therefore in such a charterparty as the present subject to the lien for demurrage, as suggested by some of the judges in *Kish* v. *Cory* (1); yet the other damages sued for cannot, we think, be brought within such a rule. A part of the damages sued for are obviously unascertained or unliquidated *damages. For such part there is no [742 lien; such part is not the "freight, dead freight, or demurrage," for which a lien is given in this charterparty.

The question therefore is, whether, in the case of a charterer who is himself the real principal, the clause under discussion absolves from breaches occurring after the loading of the ship in respect of which no remedy is given against the consignees; or, in other words, whether, upon such a charterparty, the shipowner must be held to have agreed to make no claim for damages for omissions occurring after the loading of the vessel which but for the clause would give him a right to damages. If the latter be the true construction, the result is that, upon such charterparties as the present, the shipowner, in order to secure freight as on a full cargo, and compensation for delay strictly to be called demurrage delay, and perhaps for further delay giving damages in the nature of demurrage delay, occurring before or during the loading of his ship, undertakes the risk of all defaults of the charterer or his agents happening after the ship is loaded.

So far as the damages which are claimed are covered by

(1) Law Rep., 10 Q. B., 553.

the lien, we think there can be no doubt that the charterers are absolved. The question is as to the part of the damages which is not so covered. The rule must be deduced from, or, at all events, cannot properly be declared without considering, the decided cases. The question has always been whether the liability sued for was one of those which was to cease as soon as the cargo was on board; see *Oglesby* v. *Yglesias* (1); and, in *Milvan* v. *Peres* (2), the liability sued for occurred before or during the loading; but the clause was in terms applicable to "all matters and things *as well before as after* the shipping of the said cargo." It was, therefore, held that the charterers were by express terms absolved upon the loading in respect of all liabilities, whether they occurred before or after the loading; and this without reference to whether the liability was or was not transferred to the consignees by the medium of a right of lien given to the shipowner: for, in the first case, the claim was for demurrage, but in the second was for damages for not loading in regular turn or in a reasonable time.

743] *In *Bannister* v. *Breslauer* (3), the claim was for not loading with all dispatch or within a reasonable time. The clause was, "The charterer's liability to cease when the cargo is shipped, provided the same is worth the freight on arrival at the port of discharge; the captain having an absolute lien on it for freight, dead freight, and demurrage," &c. The defendants were not said to be agents. The court held that the clause absolved the defendants. But it cannot be denied that the case has been since doubted, on the ground that apparently no lien was given for the damages sued for. In *Pedersen* v. *Lotinga* (4), the claim was for delay in loading. The clause was, that "the charter being concluded by the charterer on behalf of another party, it is agreed that all liability of the former shall cease as soon as he has shipped the cargo, the owners and master agreeing to rest solely on their lien on the cargo for freight and demurrage." The court held that the defendants were not absolved in respect of the liability for delay in loading, and that the clause absolved only from future liabilities. In *Gray* v. *Carr* (5), in error, the second part of the clause was in question. The action was against the consignee as upon a lien for dead freight and demurrage and detention at the port of loading. It was held that a lien was given for demurrage, but that no lien was given for the damages occa-

(1) E. B. & E., 930; 27 L. J. (Q.B.), 356.
(2) 2 E. & E., 495; 30 L. J. (Q.B.), 90.
(3) Law Rep., 2 C. P., 497.
(4) 28 L. T., 267.
(5) Law Rep., 6 Q. B., 523.

sioned by detention at the port of loading beyond the demurrage days. The clause, therefore, as to the absolution of the charterer, must be construed subject to such decision as to the limits of the lien against the consignee. In *Christoffersen* v. *Hansen* (1), the clause was for delay in loading. It was assumed that no lien was given for such delay. It was held that *consequently* the true construction was that the charterer, though in fact an agent, was only absolved from liability which might accrue after the loading, and was not absolved from liability for delay in loading. In *Francesco* v. *Massey* (2), the claim was against the charterers, as principals in fact, for five days demurrage and damages for fourteen days further detention at the port of loading. The liability for the detention was admitted; but it was argued that, *because there was a lien for the demurrage against *the consignee*, the true construction [744 was that the charterer was absolved in respect of it, although it was antecedent to the loading. And the court held for the defendants. In *Lister* v. *Van Hansbergen* (3) the claim was for delay in loading. It was held that the clause did not absolve the charterers. In *Kish* v. *Cory* (4), in error, the claim was for demurrage at the port of loading. It was held that the clause absolved the charterer, though principal in fact. The court approved of the decision in *Francesco* v. *Massey* (2), and held that the absolution applied to past liabilities, where a lien was given in respect of them. The inclination of many of the judges, in face of the increasing number of such charterparties made in ordinary course of business, seemed to be to extend the lien rather than to diminish the absolution.

In all the cases, then, it will be seen, the dispute has been as to the extent of the absolution in respect of liabilities accruing before the loading; in every case it has been assumed or expressly declared that it is complete as to liabilities which might otherwise accrue after the loading. The words of the clause must necessarily absolve from all future liability; or mean nothing.

The rule, therefore, seems to be, that, where the words of the absolving part of the clause plainly show that *all* liability is to cease on loading, it is so to cease both as to antecedent and future liabilities, and without regard to any lien; but, where the words of the absolving part are open to either interpretation, then, without regard to lien, liability as to future transactions is not to accrue, but liability as to ante-

(1) Law Rep., 7 Q. B., 509.
(2) Law Rep., 8 Ex., 101.
(3) 1 Q. B. D., 269.
(4) Law Rep., 10 Q. B., 553.

cedent breaches is to cease only so far as an equivalent lien is given.

It follows that, in the present case, the defendants are absolved by the clause in respect of all the damages sued for, whether a lien be or be not given as to part of them. Judgment on the whole record must therefore be given for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Vizard, Crowder & Co.*, for Yates, Son & Co., Liverpool.

Solicitors for defendants: *Hollams, Son & Coward.*

[1 Common Pleas Division, 745.]

June 26, 1876.

[IN THE COURT OF APPEAL.]

745] *KEAY and Another v. FENWICK and Others.

Shipping—Authority of managing Owner—Liability of Co-owners—Commission on Sale of a Ship—Construction of Power of Attorney.

D., the managing owner of a ship, through the plaintiffs, his agents at Constantinople, sold her to the Turkish Government, and received a bill upon the Oriental Bank in London for the amount of the purchase-money, which bill was duly paid. D. had no express authority at the time from the defendants (who were the owners of 23/64ths of the ship) to sell her, but the latter knew that a sale was contemplated; and, after the sale, they executed a power of attorney, reciting that they had agreed to sell the vessel to the Turkish Government, and had actually received the purchase-money, and empowering the plaintiffs to transfer their respective shares and to hand over the vessel to the purchasers. The defendants afterwards received from D. (or settled in account with him) the value of their respective shares:

Held, that the jury were warranted in finding that the defendants had authorized the sale of the ship by D., or had by their subsequent ratification so adopted his act as to render them jointly liable to the plaintiffs for the commission due to the latter on the sale.

Held also, that the position of the defendants was not so altered by the fact of the plaintiffs having drawn upon D. a bill at three months' date for the amount of the commission, as to release the former from liability upon the dishonor of the bill.

THIS was an action brought by the plaintiffs, who are shipping agents and merchants carrying on business at Constantinople, to recover against the defendants, who were joint owners with one Dale (who acted as managing owner) of a screw steamship called the Westminster, to recover the sum of £511 18*s.* 3*d.*, the balance of a claim of £731 6*s.* for commission on the sale of that vessel to the Ottoman Government through their intervention in April, 1874.

The cause was tried before Lindley, J., at the sittings in Middlesex, after Trinity Term, 1875. The facts were as follows:—

The defendants and Dale were joint owners of the Westminster, and Dale and certain other persons were joint owners of another steamship called the Buckingham. These two vessels being at Constantinople, Dale, in January, 1874, acting as managing owner *of both, through the in- [746
tervention of the plaintiffs as his agents at that place, entered into negotiations with an agent of the Turkish Government for the sale of them, and ultimately, on the 19th of that month sent to the plaintiffs a telegram authorizing the plaintiffs to sell the Westminster for £19,000, which they accordingly did on the 30th of that month, remitting to Dale at North Shields a bill upon the Ottoman Bank, London, payable at thirty days' sight. The plaintiffs about the same time also sold the Buckingham. The agreed commission they were to receive for the two was £1,550, £718 5*s*. 10*d*. of which was to be appropriated to the Westminster, and the rest to the Buckingham. For this sum (£718 5*s*. 10*d*.) and some other charges (amounting altogether to £731 6*s*.) the plaintiffs on the 4th of April, 1874,—which was after they had ascertained who the owners were,—drew upon P. Dale & Co. of North Shields a bill at three months, which was accepted by Dale in the name of his firm: but, before its maturity, Dale filed a petition under s. 125 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), for a liquidation by arrangement, in the Newcastle county court; and at the first meeting of his creditors held on the 22d of July, the statutory number of his creditors agreed to accept a composition of 6*s*. 8*d*. in the pound on the amount of their respective debts, payable as follows, viz., 3*s*. in the pound one month after the filing of the resolution, 3*s*. in the pound three months later, and 8*d*. in the pound at the expiration of twelve months from the last-mentioned date. The plaintiffs were parties to this arrangement in respect of the acceptance for £731 6*s*., and received the composition.

Dale paid a portion only of the £19,000 purchase-money over to his co-owners; one of the defendants, Stanley, receiving £1,100 in cash and Dale's acceptance for £1,400 at six months' date, being £2,500, his proportion of the purchase-money, less a sum claimed by Dale as charges on the ship; this acceptance, however, was dishonored at maturity. The other defendants received their respective shares of the purchase-money from Dale, or settled for the same in account with him.

At the time of effecting the sale of the Westminster, the plaintiffs did not know that the defendants were part owners, and the *sale was effected without the ex- [747

press authority of the defendants: but, their assent to the transfer being necessary, they afterwards, on the 19th of February, 1874, executed a power of attorney in the following terms:—

"To all whom these presents shall come, we George Dryden Dale, of North Shields, shipowner, John William Fenwick, of the same place, solicitor, Frank Stanley, of Newcastle-upon-Tyne, gentleman, and Pearson Armstrong, of the same place, solicitor, send greeting: Whereas we the said several persons are the registered owners of the screw steamship Westminster, of Shields, as appears by a certified copy of the register of the said vessel hereunto annexed, under the hand of Henry Lindsay, collector of customs at the port of Shields, which said vessel is now at Constantinople: And whereas we have agreed to sell the said steam vessel to the Turkish Government, and have actually received the purchase-money, we are desirous of appointing the hereinafter-mentioned attorneys to sign, seal, and execute the necessary bill of sale or transfer of our shares of and in the said vessel to the Turkish Government aforesaid: Now, know ye that we the said G. D. Dale, J. W. Fenwick, Frank Stanley, and P. Armstrong do and each and every of us doth hereby constitute and appoint Messrs. Keay & Donald, steam shipping agents at Constantinople, and each partner in that firm jointly and separately, our and each of our true and lawful attorneys and agents, attorney and agent, for us and every of us to sign, seal, and execute any bill of sale or document necessary for the purpose of assigning or transferring our shares in the said screw steamship Westminster to the Turkish Government or to whom they may appoint: and, in case the said steamer has not yet been delivered over to the purchasers, we hereby authorize and empower our said attorneys or agents to hand the same over together with her boats and appurtenances, and generally in the premises to do, perform, execute, and accomplish all such acts, deeds, matters, and things whatsoever as our said attorneys or any of them shall judge, see, or think fit or necessary to be done in the premises, as fully and effectually as we the said constituents might or could do were we personally present: And we the said constituents and each and every of us do ratify, confirm, and hold for good, effectual, and valid in law all and whatsoever our and each of our said attorneys or any of them shall lawfully do or cause to be done in and about the premises by virtue of these presents. In witness, &c."

On the part of the defendants it was contended that Dale

had no authority to sell the ship, that they never ratified the sale, that the plaintiffs had looked to Dale alone for payment and had so dealt with him as to have discharged the defendants even if they had ever been liable to the plaintiffs, and that the position of the defendants had been altered, to their prejudice, by settling their accounts with Dale before notice of the claim of the plaintiffs. On the part of the defendant Armstrong it was further contended that he was only a mortgagee of certain shares and not a part owner of the ship, and therefore could in no event be liable.

*The learned judge put the following questions to [748 the jury,—

1. Did the defendants authorize their co-owner Dale to sell the ship on the terms that the owners should pay a commission?

2. Did Dale sell the ship through the plaintiffs, and agree with them that the owners should pay them a commission? and did the defendants ratify the sale of the ship on those terms?

3. Did the plaintiffs look exclusively to Dale for the payment of their commission?

4. Did the defendants Fenwick and Stanley or either of them alter their position by settling their accounts with Dale before notice of the plaintiffs' claim, so as to make it unjust for the plaintiffs to require the defendants to pay them?

5. Was the defendant Armstrong a part owner or a mortgagee only?

The first and second of these questions were answered by the jury in the affirmative, and the third and fourth in the negative: and in answer to the fifth they found that Armstrong was a part owner.

The learned judge thereupon directed a verdict to be entered for the plaintiffs.

Benjamin, Q.C., on behalf of the defendant Fenwick, at the last Michaelmas sittings, obtained a rule *nisi* to set aside the verdict as against him, and to enter a nonsuit, or a verdict for him or all the defendants, or for a new trial, on the following grounds,—1, that there was no evidence of the contract sued upon, or ratification thereof as between the the plaintiffs and defendants,—2, that the verdict was against the weight of evidence on some or all of the questions left to the jury,—3, that the judge ought to have directed the jury that the plaintiffs, by receiving Dale's acceptance for the amount claimed by the plaintiffs after knowledge of the names of the principals and without notice to them, had

elected to trust the agent, and could not afterwards hold liable principals then disclosed,—4, that the judge ought to have ruled that there was no evidence of a joint contract,—5, that the plaintiffs, by allowing the defendants to give credit to Dale in account for commissions as if paid by him, and neglecting to notify the defendants of their claim for 749] commission till after Dale's *bankruptcy, had so altered the position of the defendants as to disentitle the plaintiffs to recover in this action.

Herschell, Q.C., obtained a similar rule on behalf of the defendant Stanley.

Wilberforce also obtained a rule on behalf of the defendant Armstrong, with an additional ground, viz., that Armstrong, being a mortgagee only, could not in any event be liable to the plaintiffs for commission on the sale of the ship.

Feb. 4. *Butt*, Q.C., *Cohen*, Q.C., and *Witt*, showed cause: They contended that, although Dale might have had no original authority to sell the ship, yet the defendants, who were all part owners, were willing that she should be sold, ratified the sale as soon as they had notice of it, executed the power of attorney giving Keay & Donald authority to execute transfer to the Turkish Government, and received from Dale their respective shares of the purchase-money; that the defendants were all jointly liable to pay the commission which they must have known would be payable to some one, and they settled their separate accounts with Dale upon the footing that it had actually been paid; and that the drawing of the bill upon Dale was no evidence of an election on the part of Keay & Donald to deal with Dale alone in the matter, it being a common and usual course of business to settle the ship's accounts with the ship's husband or managing owner. [The following authorities were referred to: *Paterson* v. *Gandasequi* (1); *Bottomley* v. *Nuttall* (2); *Whitwell* v. *Perrin* (3); *Hunter* v. *Parker* (4); *Calder* v. *Dobell* (5); *Armstrong* v. *Stokes* (6); *Heald* v. *Kenworthy* (7).]

Benjamin, Q.C., and *F. M. White*, for Fenwick, *Herschell*, Q.C., and *Shield*, for Stanley, and *Day*, Q.C., and *Wilberforce*, for Armstrong in support of the rules, submitted that there was no evidence of prior authority in Dale to sell the ship; that, though the signing the power of attorney might amount to a ratification of the sale of the ship,

(1) 15 East, 65.
(2) 5 C. B. (N.S.), 122; 28 L. J. (C.P.), 110.
(3) 4 C. B. (N.S.), 412.
(4) 7 M. & W., 822.
(5) Law Rep., 6 C. P., 486.
(6) Law Rep., 7 Q. B., 598.
(7) 10 Ex., 739, at p. 745; 24 L. J. (Ex.), 76.

it could not amount to a ratification of a contract to pay commission of which they knew nothing, so as to make each *co-owner liable for the whole; that the authority to [750 sell (if any) was an authority by each part owner to sell his share, and the ratification (if any) could go no further; that co-owners, though partners as to the particular adventure, were not joint owners in the ship, but owners only of their respective shares; that the power of attorney merely entitled Keay & Donald to do what each of the part owners could do, viz., transfer each his own shares in the ship; and that taking a security from Dale for the balance of the commission so altered the position of the defendants as to discharge them from any liability they might otherwise have incurred, and the finding as to this was against the weight of evidence. An additional argument urged on behalf of Armstrong was, that, though in other respects in the same position as the other defendants with regard to the question of ratification of the sale, he was not in fact a part owner, but only mortgagee of certain shares in the ship, and that the money which he received was the amount of his mortgage debt and interest only, and was received by him before he executed the power of attorney.

Cur. adv. vult.

Feb. 28. The judgment of the court (Lord Coleridge, C.J., and Denman and Lindley, JJ.) was delivered by

LINDLEY, J.: This was an action in which the plaintiffs, who were ship brokers at Constantinople, sought to recover from the defendants, as owners of the steamship Westminster, the sum of £511 18*s.* 3*d.*, being the balance of the plaintiffs' account against the owners of the ship. The main point in dispute was whether the plaintiffs were entitled to be paid by the defendants a sum claimed by the plaintiffs as commission on the sale of the ship to the Turkish Government.

The ship was in fact, on the instructions of Dale, sold by the plaintiffs to the Turkish Government for £19,000. Dale was one of the owners of the ship,—the managing owner. The price was paid by means of a bill; and this bill was sent to Dale by the plaintiffs, they at the time knowing nothing of the defendants. Dale divided this sum, less certain deductions for commission and other matters, amongst the defendants and himself. Afterwards, and after the plaintiffs had ascertained who the owners were, the *plain- [751 tiffs drew a bill on Dale for the balance due to them, including their commission; and he accepted the bill. He subsequently became bankrupt, and the plaintiffs proved

against his estate for the amount of the bill, and received a dividend on it. The sum sought to be recovered in this action was the amount of the bill, less the dividend.

The defendants contended that Dale had no authority to sell the ship; that the defendants never ratified the sale; that the plaintiffs had looked to Dale alone for payment, and had so dealt with him as to have discharged the defendants, even if they had ever been liable to the plaintiffs. One of the defendants, Armstrong, further contended that he was only a mortgagee of the ship, and not a part owner.

The jury found, in answer to questions left to them by the judge at the trial, that the defendants did authorize their co-owner, Dale, to sell the ship on the terms that the owners should pay a commission; that he did sell her (through the plaintiffs) on those terms; that the defendants ratified such sale; that the plaintiffs did not look exclusively to Dale for payment; that the defendants had not altered their position by settling their accounts with Dale before notice of the plaintiffs' claim so as to make it unjust for the plaintiffs to require the defendants to pay them; and that Armstrong was an owner, and not a mortgagee.

On these findings the plaintiffs had a verdict. Rules were obtained to set aside this verdict as against the defendant Fenwick, and to enter a nonsuit or a verdict for him or all the defendants, or for a new trial, on the following grounds,—1. That there was no evidence of the contract sued upon, or ratification thereof as between the plaintiffs and defendants,—2. That the verdict was against the weight of evidence on some or all of the questions left to the jury,—3. That the judge ought to have directed the jury that the plaintiffs, by receiving Dale's acceptance for the amount claimed by the plaintiffs after knowledge of the names of the principals and without notice to them, had elected to trust the agent, and could not afterwards hold liable principals then disclosed,—4. That the judge ought to have held that there was no evidence of a joint contract,—5. That the plaintiffs, by allowing the defendants to give credit to Dale
752] in account of commissions as *if paid by him, and neglecting to notify the defendants of their claim for commissions till after Dale's bankruptcy, had so altered the position of the defendants as to disentitle the plaintiffs to recover in this action. Similar rules were obtained on behalf of Stanley and Armstrong; the latter stating an additional ground, viz.,—6. That the defendant Armstrong, being a mortgagee only, was not liable to the plaintiffs for commission on the sale of the ship.

The jury were, perhaps, hardly justified in finding that an authority to sell was given by the defendants to Dale before the ship was sold: but, in all other respects, we think there was ample evidence to support their findings. The evidence of ratification consists mainly of the power of attorney signed by all the defendants, and dated the 19th of February, 1874, and of the division of the money realized by the sale. The power of attorney was as follows: [The learned judge read it.]

It was contended first of all that this was not a joint authority, but only an authority from each defendant to sell his own shares, and that the authority could not in point of law amount to anything else. But, although it is true that each of several co-owners of a thing can only sell or authorize the sale of his own interest in that thing, yet it is also true that all the co-owners of a thing may combine and sell or authorize the sale of that whole thing: and this is really what the defendants did. The authority they conferred was one authority given by them all collectively to sell the whole ship, and not several authorities given by them separately to sell their respective shares in her.

There is no legal principle or rule which precludes several co-owners from jointly retaining a solicitor to bring or defend an action relating to their common property: nor is there any reason why several co-owners of property may not act jointly in respect of it. Whether they have done so or not in any particular case, must depend on the circumstances of that case. In this case the jury found that the defendants had so acted; and we think that the jury were quite right in coming to this conclusion.

It was contended, secondly, that, even if the defendants did ratify the sale of the ship, they did not ratify her sale on commission. But the defendants knew that Dale was in England, and *that the ship was sold in Constanti- [753
nople, and that, in the ordinary course of business, she could only be sold by some agent, and that agent would require to be paid. A ratification of the sale was a ratification of a sale in the ordinary course of business; and it is not competent for the defendants to ratify part of the transaction and repudiate the rest.

Great stress was laid by the defendants on the fact that Dale sold two ships to the Turkish Government through the plaintiffs, and that the defendants were only interested in one of them; and that the commission sought to be recovered in this action was fixed by Dale and the plaintiffs after the power of attorney was given, and by apportioning

the commission for the sale of the two ships between them both. But there was no evidence to show that the commission sought to be recovered was improper or unusual in amount; and consequently the time at which the precise amount was settled, and the mode by which such amount was arrived at, are not, we think, material elements in the case.

It follows from what we have said, that the defendants became jointly liable with Dale for the payment to the plaintiffs of the commission claimed by them.

It remains to be considered how this liability has been got rid of. *Bottomley* v. *Nuttall* (1) shows that the mere facts that the plaintiffs, knowing that the defendants were co-owners of the ship with Dale, took a bill from him for the amount due to them, and proved against his estate in respect of such bill, are not necessarily sufficient to discharge the defendants. The only additional facts were, that the defendants had received from Dale moneys on account of their shares of the sum of £19,000 realized by the sale of the ship. But none of the defendants had really altered his position for the worse by so doing; none of them had by finally settling any account with him or otherwise discharged him from any liability which he may have been under to them. Armstrong, indeed, discharged him from all liability; but Armstrong got paid everything which he claimed to be due to him. The jury were, therefore, fully warranted by the evidence in coming to the conclusion that none of the defendants had so altered his position as to render it unjust
754] on the part of the plaintiffs to have recourse to *him. Even if one of the defendants had so altered his position, we are by no means sure that this circumstance would have afforded a defence to the action: for, this is not the simple case of an agent acting for an undisclosed principal; it is a case where the agent, being an owner, is liable with his undisclosed principals who are his co-owners; and it may well be that a dealing with him which would discharge the others if they were not liable jointly with him, might not have that effect if they were. Such a dealing might be more analogous to a covenant not to sue than to a release.

As regards Armstrong's position, he represented himself to the plaintiffs as owner, and not as mortgagee; he was registered as owner, and a copy of the register was sent to the plaintiffs with the power of attorney: and, even if Dale could in equity have successfully contended, as against Armstrong (who it must be remembered was his own solicitor), that the instrument of the 12th of February, 1872, was

(1) 5 C. B. (N.S.), 122; 28 L. J. (C.P.), 110.

a mortgage and not a sale, still Armstrong joined in the power of attorney as an owner, and cannot be heard now to deny that he was what he therein represented himself to the plaintiffs to be. Whether he was in fact mortgagee or owner, he joined the other defendants in ratifying the sale, and rendered himself jointly liable with them for what Dale had done for the common benefit of all.

The items in the account relating to other matters besides commission are properly chargeable against the defendants as owners of the ship; for, the ratification by them of her sale at Constantinople involves a ratification of her voyage there from Malta, and also a ratification of the discharge of her crew when she was handed over to the Turkish Government. The items in question were for advances properly made for the purposes of such voyage, and for paying off the dismissed crew.

All the rules, therefore, will be discharged, with costs.

Rules discharged.

The defendants appealed against this judgment: and the appeal was argued before James and Mellish, L.JJ., and Baggallay, J.A., on the 26th of June, 1876. The same counsel appeared for the respective parties as in the court below, and the arguments urged were substantially the same.

*JAMES, L.J.: I am of opinion that the judgment of [755 the Common Pleas Division in this case should be affirmed. Upon the evidence and the findings of the jury upon the several questions put to them, we have to consider whether there is any rule of law that the questions should not have been so left or ought not to have been so found. The first in effect is whether in selling the ship the plaintiffs acted under a joint employment or joint retainer of the co-owners. The plaintiffs, who were the agents of the ship at Constantinople, received instructions from Dale, the ship's husband, to sell her for a satisfactory price. The employment of the agents was an employment to do something for the owners. They could not have supposed they were acting upon the sole responsibility of Dale. They were authorized to sell for the owners of the ship, all of whom knew that a sale was in contemplation. Dale gave instructions for the sale, because he knew that his co-owners did not object to a sale: and all of them joined in a power of attorney to enable the agents at Constantinople to convey their respective shares to the purchaser, and each received his share of the purchase-money. That is as complete a ratification as could be of the sale; and it follows that all

the co-owners were liable for the commission payable on the transaction. I think the jury might well find that there was an authority to sell; and at all events that there was a complete ratification of the acts done for the benefit of all the co-owners. It seems to me that there was a joint authority to sell, and a joint obligation to pay the commission due upon the sale; and that there was no defence to the action. Then, was that which afterwards took place between Dale and the plaintiffs a legal release of the joint liability? No authority has been cited to show that taking a bill by which time is given from one of several joint debtors discharges the others. I can see no distinction in this respect between partners and joint contractors. The taking a bill from Dale for the balance of the commission, therefore, clearly was no legal release of the liability of his co-owners. If not, the third question was properly put and properly answered by the jury. Then, was there any such dealing between the plaintiffs and Dale as did or could alter the position of the defendants or either of them? The jury found there was not; and I entirely agree with them. There
756] *was no evidence that the drawing of the bill by the plaintiffs upon Dale (which was unknown to the defendants) induced either of them to alter his position in any respect. Upon that the finding of the jury is conclusive.

MELLISH, L.J.: I am of the same opinion. Having regard to the terms of the power of attorney, I think it is impossible to say that there was not a joint authority by all the part owners to sell the ship. They all knew beforehand that the ship was about to be sold. They were all anxious to get rid of her if a good price could be obtained for her. I think the jury were perfectly well warranted in finding that there was prior authority in Dale to sell the ship. But, when we come to look at the power of attorney by which the plaintiffs, the agents at Constantinople, were authorized by all the part owners to convey their respective shares, it seems to me to be impossible to doubt that all jointly authorized the agents to execute a transfer, and all were liable for their commission. The fact of part of the commission being paid by a bill on Dale can make no difference. That is not an unusual way of making payments by a ship's husband. He could hardly pay in any other way. Having left the mode of settlement to Dale, the co-owners are bound by his acts. As to Armstrong, the evidence as to his actual position was, to say the least of it, ambiguous. The jury found that he was a part owner; and the question was entirely for them.

BAGGALLAY, J.A.: I am of the same opinion. It is immaterial to consider whether or not there was an original authority given by all the co-owners to Dale to sell the ship, because we are all agreed that there was a complete and clear recognition of the sale and transfer by the power of attorney. It is impossible to read the terms of that instrument without seeing that it is a recognition of a joint liability to pay the commission due upon the sale. Indeed, it was almost admitted in argument that that would have been so if no bill on Dale had been drawn. Can the mere fact, then, of Dale having given his acceptance for a part of the commission, which was dishonored when due, release the defendants from their liability? *Bottomley* v. *Nuttall* (1) is a distinct *authority to show that that can make no [757 difference. Then it is said that the surrounding circumstances show that the dealings between the plaintiffs and Dale altered the position of his co-owners to their prejudice. That was essentially a question for the jury; and they were unanimously of opinion that there were no such circumstances. I cannot doubt that they came to a proper conclusion.

QUAIN, J.: I am entirely of the same opinion.

Judgment affirmed.

Solicitors for plaintiffs: *Pritchard & Sons.*
Solicitors for Fenwick: *Stibbard & Cronshey.*
Solicitors for Armstrong: *Belfrage & Middleton.*
Solicitors for Stanley: *Pyke, Irving & Pyke.*

(1) 5 C. B. (N.S.), 122; 28 L. J. (C.P.), 110.

[1 Common Pleas Division, 757.]

June 1, 1876.

[IN THE COURT OF APPEAL.]

WILLIAMS and Others v. THE NORTH CHINA INSURANCE COMPANY.

Marine Insurance—Ratification with Knowledge of Loss—Valued Policy—Opening Valuation.

Where a policy of marine insurance is made by one person on behalf of another without authority, it may be ratified after the loss of the thing insured by the party on whose behalf it is made, though he know of the loss at the time of such ratification.

Where there was a valued policy on "freight:"

Held, that the rule that the valuation in a valued policy is conclusive did not prevent the court from looking into the elements of which the valuation was made up to ascertain whether the freight intended to be so valued was the full freight, or the freight after deducting certain advances made against freight by the charterers' agents to the captain, such question becoming material for the purpose of ascertain-

ing whether the shipowner was interested in the whole of the subject-matter of insurance, and whether to any extent the loss had been satisfied under another policy of insurance effected by the charterers on the said advances against freight.

APPEAL from the judgment of the Common Pleas Division in favor of the plaintiffs.

Declaration, first count, on a policy of insurance expressed to be on "estimated amount of freight valued at 69,807 guilders and 44 cents," i.e., £5,941 1*s.* 2*d.*, the freight 758] of the ship Queen of the *Colonies, on a voyage from one or more ports in Java to Falmouth, for orders, and from thence to a port in the United Kingdom, or on the Continent of Europe between Havre and Hamburg. Money counts.

Pleas to the first count denying the insurance, the interest of the plaintiffs in the subject-matter of insurance, and the loss by the perils insured against, and a plea that the same subject-matter of insurance had been insured by the plaintiffs in other policies, and that the underwriters of such other policies paid to the plaintiffs a large sum, and the plaintiffs thereby became satisfied and indemnified for the loss. To the money counts, never indebted and payment. Issues thereon.

At the trial, before Denman, J., at the Michaelmas sittings, 1875, in London, the facts were admitted to be as follows:

The plaintiffs were the owners of a ship called the Queen of the Colonies, which was managed for them by a firm called Smith, Billborough & Co. The ship had been chartered at a freight of £3 10*s.* per ton for a voyage from Batavia, in Java, to ports in Europe, and the charter provided that the ship was to be addressed to the charterers' agent at the port of loading and discharge, paying one commission of 2½ per cent. in all. It also provided that sufficient cash, not exceeding £600, was to be advanced against freight if required at ports of loading, subject to insurance and 2½ per cent. commission.

The charterer assigned the charterparty to a firm called Lorrain & Co. Lorrain & Co. loaded the ship at two ports in Java, through Abraas & Co., their agents at those ports. Before the vessel sailed Abraas & Co. submitted the disbursement account to the captain of the ship, and he signed it as correct. This account was as follows:

	£	*s.*	*d.*
"To cash, per receipt, f. 1,920.58, at the rate of 11.60 per £	165	11	4
" 2½ % commission on £5,796 3*s.* 2*d.* .	144	18	0
" 3 % insurance on £5,941 1*s.* 2*d.* . .	178	4	7
	£488	13	11 "

*This account was forwarded to Messrs. Lorrain & [759
Co. by Messrs. Abraas & Co. On receipt of it, Lorrain & Co. wrote a letter on the 19th of October, 1874, to Abraas & Co., complaining that the accounts were not correct, and proceeding as follows:

"Ship's disbursements a/c. Was the 3 % insurance on the £5,941 1*s.* 2*d.*—£178 4*s.* 7*d.*, done by request and on account of the captain, as being entirely in the interest of his owners? If so, then you should have charged the ship with

	£	s.	d.	£	s.	d.
"Cash per receipt . . .	165	11	4			
3 % insurance on freight . .	178	4	7			
				343	15	11
2½ % commission on £343 15*s.* 11*d.*, due L. & Co. per charterparty . . .				8	11	11
Ditto, address commission . . .				144	18	0
3 % marine insurance on total advance, £512 13*s.* 5*d.*				15	7	7
				£512	13	5

"If, however, the above item is intended to represent the marine insurance on advances to ship a/c. of freight, then of course it is wrong, and the a/c. should have stood thus:

	£	s.	d.
"Cash advanced	165	11	4
Our 2½ % address commission on £5,796 3*s.* 2*d.*	144	18	0
" " " £165 11*s.* 4*d.* (cash advanced)	4	2	9
3 % marine insurance on £324 6*s.* 8*d.* . .	9	14	7
	£324	6	8

"Please let us know at once which is right, as we must provide for insurance on whatever has been advanced."

Messrs. Lorrain & Co. also telegraphed to Abraas & Co. on the 3d of November as follows: "Was it clearly understood by Captain Jones that we must insure his whole freight money for him?"

Messrs. Abraas & Co. replied to the letter of the 19th of October, that it would be difficult to alter the account of the *Queen of the Colonies, seeing that it had been ap- [760
proved and signed by the captain.

Lorrain & Co. wrote on the 9th of November, 1874, to Abraas & Co. as follows:

"We have your letters of the 23d and 26th ultimo, contents of which are noted; but we regret that you have given

us none of the explanations asked for in our respects of the 19th idem. Still hesitating to do the very unusual thing of insuring an estimated freight, and feeling that there might possibly be some misunderstanding on the matter, we wired you on the 3d instant if it were distinctly intended that we were to do so, and the following afternoon we got your reply, 'Think it was Captain Jones's desire, as he approved and signed your note of charges,' leaving us where we were before. We were therefore obliged to accept the captain's account so far as it goes,

	£	s.	d.
Viz.	488	13	11
To which will have to be added per our letter of 19th	8	11	11
And	15	7	7
	£512	13	5

insuring both freight and advance, and holding you answerable for the two latter amounts in case we fail to recover the same from the owner, who may repudiate the captain's account, same not being in accordance with the terms of the charterparty."

Messrs. Lorrain & Co. effected the policy upon which the action was brought on the 9th of November. The ship was totally lost on the 25th of January, 1875, with her cargo; after the loss, and with knowledge of it, the plaintiff's agents Smith, Billborough & Co. wrote to the insurance brokers, in whose hands the policy was, as follows: "We learn from the captain of our late ship that his charterers in Java, acting under his instructions, insured his freight and disbursements. These policies we incidentally hear are in your possession. We beg to inform you that we are prepared to pay, in cash, the small amounts advanced to our captain in Java by the charterers of our ship for insurance and disbursements, and will then trouble you to hand over
761] to us these policies, in which *no one but ourselves will have any interest." The policy sued upon was accordingly handed to the plaintiffs. Messrs. Lorrain & Co. effected a separate policy at Batavia, at the same time as they effected the policy sued upon, in the sum of £512 13*s.* 5*d.*, "advance against freight" with the defendants' company, the amount of which was paid by the company to them. The plaintiffs had insured the freight of the ship with various underwriters in London by different policies, dated respectively the 10th of April, 1874, and the 22d of June, 1874, for various sums, amounting in the aggregate

to £5,500. These underwriters paid to the plaintiffs the amounts for which they had respectively underwritten, and took in each case a receipt in the following form:

"Received this day of and from the Insurance Company, the sum of £, as and by way of purchase of our interest to that extent in respect of a total loss of freight under a certain policy of insurance effected for us with the North China Insurance Company on freight by the Queen of the Colonies from Java to a port in the United Kingdom or Continent, valued at 69,807 guilders and 44 cents, and bearing date the 5th day of November, 1874, with full power and authority to use our names in any proceedings that they may be advised to take for the recovery thereof, they indemnifying and saving us harmless from the costs of all such proceedings. And we undertake to treat such payment as a purchase to the extent of our rights against the North China Insurance Company for such loss, and to assign our right to that extent to the Insurance Company when called upon. Smith, Billborough & Co."

On these facts the counsel for the defendants objected that the antecedent insurances in London covered all the freight that the plaintiffs intended to insure; that the insurance on which the action was brought was not authorized by the plaintiffs; that the insurance was never ratified by the plaintiffs so as to bind the defendants either as to time or circumstances; that the insurance was not intended by Lorrain & Co. when effected to be for the benefit of the plaintiffs; that if the defendants were bound, the whole subject-matter of the insurance was not at risk.

A verdict was entered by consent for the plaintiffs for the *amount claimed in the declaration, subject to the [762 opinion of the court, with power to draw inferences, as to whether the plaintiffs or defendants were entitled to the verdict, and if the plaintiffs, for what amount. Judgment to be moved for.

A motion was subsequently made accordingly to enter judgment for the defendants, but the court refused the application, and entered judgment for the plaintiffs for £441 1*s.* 2*d.*

Against this decision the defendants appealed.

Benjamin, Q.C., and *Cohen*, Q.C. (*Lanyon* with them), for the defendants: It is contended, in the first place, that Lorrain & Co. did not make this policy for the plaintiffs but to secure themselves from responsibility, and therefore the plaintiffs could not ratify it. Secondly, it is contended that the plaintiffs had no insurable interest in that portion

of the freight which the sum now sought to be recovered represents, and that they have already been paid under the policies effected in England all that could otherwise be recovered under this policy. The policy is, no doubt, a valued policy, and the valuation in such a policy cannot be opened; but the question is, what was the subject of valuation, and it is clear that it is open to the underwriters to show that the accused has no interest in a portion of the subject-matter so valued, or that he has been already indemnified under another insurance in respect of all that formed such subject-matter. It is obvious, looking to the facts of this case and the figures, that what was here the subject-matter of the valuation was the whole freight, including the advances, and not the freight deducting the advances. The shipowner, not being entitled to the full freight, but only the freight minus the advance, can only recover to the extent to which he was entitled. The portion of freight corresponding to the advances he had parted with to his agents, who have insured it independently, and have recovered the full amount of such insurance. It cannot be recovered twice over. Whatever may be the division of the interest among different parties, there can be but one recovery in respect of the same portion of the subject-matter of valuation. [They cited on this point *Irving* v. *Richardson* (1).] Thirdly, there cannot be 763] a ratification with *knowledge of the loss; it is a general principle of law that a person can only ratify when he is competent to make the contract which he ratifies. A person could not insure with knowledge of the loss; consequently he cannot ratify. It is true there are decisions in which ratification with knowledge of a loss has been held good, but these were not in a court of appeal, and so are not binding on this court. [They cited on this point *Routh* v. *Thompson* (2), *Couturier* v. *Hastie* (3), *Hagedorn* v. *Oliverson* (4), *Jardine* v. *Leathley* (5).] Fourthly, though the underwriters in England might recover contribution in a proper form of action they cannot recover in this action.

Butt, Q.C., and *J. C. Mathew*, for the plaintiffs: It is clear that the insurance was effected on behalf of the shipowners, for they were charged commission on the premium. With regard to the second point, it is contended that there is no power to go behind the valuation in the policy. If it was intended to cover the shipowner's interest, but by mis-

(1) 2 B. & Ad., 193.
(2) 13 East, 274.
(3) 8 Ex., 40; 22 L. J. (Ex.), 97.
(4) 2 M. & S., 485.
(5) 3 B. & S., 700; 32 L. J. (Q.B.), 133.

take there was included more than the value of his interest in making the valuation, still in the absence of fraud the valuation is conclusive. The question is, therefore, what was intended to be insured—the entire freight or the residue of the freight after deducting the advances. It is contended that the words of the instrument must be construed in their natural business meaning. The word "freight" in its natural business sense would not include the advances which were not at the shipowner's risk, but the shipowner's interest only, viz., what was to be paid on the delivery of the cargo. If this was what was insured, the fact that by mistake the advances were not deducted in making the valuation is immaterial. It was a mere case of over-valuation, which in the absence of fraud could not be opened. [They cited on this point *Barker* v. *Janson* (1), *Lidgett* v. *Secretan* (2). Thirdly, the ratification of the policy by the plaintiffs was good, though it took place with knowledge of the loss. The authorities to that effect are of too long standing to be overruled. Fourthly, the plaintiffs are suing as trustees for the underwriters to whom the policy was assigned.

*COCKBURN, C.J.: I think the judgment must be [764 reversed. The first question is, whether this policy was effected on behalf of the shipowners in this country. I can come to no other conclusion than that it was. Messrs. Lorrain & Co. protected themselves in respect of the advance on freight and their commission by a separate policy; but they were in this position. Their agent at Java had, in an account stated with the captain of the ship, charged the captain with the amount of premiums payable for the insurance not only of the freight still remaining due, but of the whole freight, including the advances. Messrs. Lorrain & Co. appear to have been in considerable doubt how to act in consequence of their agent's conduct, and seem to have thought they might involve themselves in serious liability, if, having received the premium, they failed to insure the shipowners' interest in the freight. I think, therefore, that they intended to insure for the benefit of the shipowners and to cover the whole freight. But under the circumstances the efficiency of this insurance by them as agents on behalf of the shipowners would depend on ratification by the principals. But the ratification was not until after the loss had occurred and was known to the principals. The existing authorities certainly show that when an insurance is effected without authority by one person on another's behalf, the principal

(1) 1 Law Rep., 3 C. P., 303. (2) Law Rep., 5 C. P., 190; 6 C. P., 616.

may ratify the insurance even after the loss is known. Mr. Benjamin asked us, as a Court of Appeal, to review those authorities. His contention was that there could only be a ratification when the principal could himself make the same contract as that ratified. Admitting that for general purposes this rule may be good, the authorities which we are asked to overrule are much too strong and of too long standing to be got over. When a rule has been accepted as the law with regard to marine insurance for nearly a century, I do not think we ought to overrule it lightly, because insurances have probably been effected on the basis of the law that has so become settled, and mischief might arise from the disturbance of it. Moreover, I think that this is a legitimate exception from the general rule, because the case is not within the principle of that rule. Where an agent effects an insurance subject to ratification, the loss insured against is very likely to happen before ratification, and it must be taken that the insurance so effected involves that 765] possibility as the basis *of the contract. It seems to me that, both according to authority and the principles of justice, a ratification may be made in such a case. That being so, the ratification does in fact take place, and the next question is, whether the plaintiffs can recover on this policy under the circumstances that have occurred. I quite agree that the policy being a valued policy the freight insured must be taken at the estimated value, and the policy cannot be opened nor the value of the thing insured disputed. But the court is entitled to inquire of what elements the estimate of freight was made up, in other words, of what the freight so insured consisted, and to see whether the plaintiffs' claim with reference to such freight has been satisfied or not. We are of opinion that when the matter comes to be looked into it turns out that the plaintiffs have been paid more than the policy covers. This part of the case depends on the figures which I will not touch upon, because the Master of the Rolls has gone carefully into them and will deal with them. The remaining question is, as to the position of the underwriters for whom it is alleged that the plaintiffs are suing as trustees. Can they be in any better position than the plaintiffs themselves? We think not. They might be entitled to contribution, but instead of suing for contribution they prefer to take this so-called assignment of the policy from the plaintiffs, and to sue in their name for the entire amount of the policy. It seems to me that if they are defeated in consequence they are hoist by their own petard.

We are of opinion that the judgment should be for the defendants.

JESSEL, M.R.: I am of the same opinion. The first question is one of evidence merely. Did Lorrain & Co. insure on behalf of the owners? Looking at all the facts I think they did. The next question is, What did they insure? We have been much pressed by the rule that in the case of a valued policy you cannot open the valuation. This only means, however, that you must take the value of the thing insured as proved; it does not settle the question what the thing insured is. The question here is, what was insured under the words "estimated freight." Was it meant that the total freight, including advances, should be insured, or only so much of the freight as remained unpaid, or due, *or to become due to the shipowners? It is really a [766 question of fact. The words of the policy may mean either. They may cover the portion of freight paid in advance or not. To ascertain whether they do we must look at the evidence. Now it is clear from the evidence that the total amount of freight, including advances, was intended to be insured. The amount of the valuation was £5,941 1*s.* 2*d.*, and we have the elements of which it is composed. It is made up of the amount of the full freight, £5,796 3*s.* 2*d.*, and of the amount of the address commission, £144 18*s.* The address commission appears to have been included under some misapprehension, because it was already included in gross freight. But the figures seem conclusive to show that the entire freight was intended to be insured. The next question is, whether the policy is legally ratified. The decisions on this subject are too old, and have been too long recognized for us to interfere with them now. They are, in one sense, decisions of an inferior court, but they were decisions of the highest court at that time but the House of Lords, and have been accepted as law in every text-book written on the subject, and have doubtless been acted on by merchants. The decisions are, no doubt, somewhat difficult to reconcile with the general principle that one who ratifies a contract must have power to make such a contract himself at the time of ratification. But the exception to that rule having been long established, and being, in my opinion, justified by convenience, I see no reason for taking so violent a step as reversing that law now. Then, the plaintiffs having power to ratify, it is clear that they did ratify. But the question now arises whether the plaintiffs are entitled to recover anything on the policy. I will assume, for this purpose, that the plaintiffs have received £5,500 on the policies

made in England, leaving £441 1*s.* 2*d.*, for which the plaintiffs had judgment below. The defendants now say that this amount of £441 1*s.* 2*d.* cannot be recovered under the policy now sued on, for this reason. They say that the plaintiffs insured the whole freight, and that a part of that freight was Lorrain & Co.'s advances, which were covered by the policy for £512 13*s.* 5*d.* effected by Lorrain & Co. to protect themselves, and the amount of which advances has been paid already upon that policy. To the extent of those 767] advances they say that the *plaintiffs cannot recover, and that it is just as if the day after the insurance was effected the plaintiffs had assigned away that part of the freight. The question, therefore, arises what the advances consisted of. We have the elements of which the sum of £512 13*s.* 5*d.* was made up. They are, the actual advance, £165 11*s.* 4*d.*; 3 per cent. insurance on freight, £178 4*s.* 7*d.*, making £343 15*s.* 11*d.*; 2½ per cent. commission on that sum, £8 11*s.* 11*d.*; the address commission, £144 18*s.*, and 3 per cent. marine insurance on total advance, £15 7*s.* 7*d.* Now, as there was a ratification of the insurance, it follows that the captain had authority to request the plaintiffs' correspondents in Java to insure and to advance money for that purpose. And the terms of the charter provided that sufficient cash, not exceeding £600, was to be advanced against freight if required at ports of lading, subject to insurance and 2½ per cent. commission. It follows that the £178 4*s.* 7*d.* was within the clause an advance against freight, and that the charges of commission on insurance were also authorized. The only sum that remains is the address commission. That is also provided for by the charterparty, and the agent might have required that it should be paid in money, but the captain signed an account in which that commission is treated as an advance against freight to the captain's order. This makes it advance freight within the terms of the charter. But, apart from the agreement with the captain, the same result would have followed. The commission is due to the charterers, who will have to pay the freight. It is not a mere matter of set-off, but the charterers would have a right of retainer. If a person employed to sell anything earns his commission and receives the purchase-money, he is only bound to pay over the balance. So, quite independently of what the captain did, by the terms of the charter the commission is a deduction from freight. The shipowner could not recover it, because, by his direction, it was paid out of the freight to a person entitled to receive it. It consequently follows that more than the sum of £444 1*s.* 2*d.*,

which was the balance remaining of the £5,941 1*s.* 2*d.*, after payment of £5,500 under the other policies, constitutes advances, which were included under the policy for £512 13*s.* 5*d.*, effected by Lorrain & Co., and the amount of which has been paid under that policy. And, consequently, there *can be nothing due to the plaintiffs upon the policy [768 now sued upon, subject to the last point, which is this. When the existence of this policy was discovered, the English underwriters wished to obtain the right of suing the North China Insurance Company, and they attempted to put themselves in the position of purchasers of the policy from the plaintiffs to the extent of the amount to which each had underwritten. They then sue in the plaintiffs' name upon the policy. No question of contribution can be raised; they could have no right of contribution till they had paid the shipowners the amounts they had respectively insured. But the argument is that they have paid nothing. It is clear that this argument puts them in the position, not of underwriters entitled to contribution, but of mere purchasers of the policy who might have been outside strangers. But it is quite clear that that cannot be the real effect of the transaction. The payments made were not really purchase-money, but payment of the amounts insured by them, and they cannot sue, as they are really doing, to recover the amounts so paid from the defendants. In a proper form of action they could establish their right to contribution, but they cannot enforce it in this action.

MELLISH, L.J.: I am of the same opinion. I agree with the judgment of the Common Pleas Division, so far as it deals with the matters that have been argued before us, and I shall only address my observations to the question on which we differ from their decision, and which does not appear to be noticed in the judgment of the court below. The whole of the question seems to depend on this. What was it which was valued at £5,941 1*s.* 2*d.* by the policy? Was it the whole of the freight, or the freight minus the advances? The insurance was no doubt made for the benefit of the shipowner, and what he was interested in was the freight minus the advances. The words "estimated amount of freight" will bear the meaning of freight minus the advances, for freight advanced is strictly speaking not freight at all. If the present case had stopped here, I should have thought the freight in which the shipowners was interested was what was estimated, but I am struck by the fact that the sum insured greatly exceeds not only the freight minus the advances, but the amount even of *the entire [769

freight. The court is entitled to inquire what was estimated in fact. Did Lorrain & Co. in fact estimate the amount of freight minus advances, or without deducting the advances? If they did the former, then as it is not alleged there was any fraud, the plaintiffs could recover the balance of the estimated amount over the £5,500 already received, but if in making this estimate the full freight was taken, then they cannot recover.

There is, in my opinion, evidence to show that in making the estimate they commenced by taking the full amount of the freight, and then added the address commission to it. There is no rule which prevents our seeing the truth in this respect now and deciding accordingly. The result is, that the full amount of freight, not deducting the advances, must be taken at £5,941 1*s.* 2*d.*, and the proper rule I should suppose to apply would be that whatever proportion the real amount of freight, deducting the advances, bore to the real amount of freight without such deduction, such proportion of the sum of £5,941 1*s.* 2*d.* the plaintiffs would be entitled to recover. This, no doubt, makes it material to determine the amount of the advances. I agree that they include all the items contained in the sum of £512, including address commission. The only thing I doubt is, whether the whole of the item of £178 4*s.* 7*d.* can be treated as part of the advance. The captain no doubt settled that in his account as part of the amount he received in advance, but it was so treated on the assumption that he would have to pay 3 per cent., but it would appear only 1½ per cent. was actually paid. I think the charterers could only treat as an advance the sum they actually did advance. But even allowing for this, the advances appear to be such as to leave no balance above the sum of £5,500 recoverable under this policy.

Pollock, B.: I am of the same opinion. It is unfortunate that the main point upon which we decide should not have become distinctly apparent in the court below, so that it comes before us without having been completely sifted. It is clear, I think, that this insurance was effected for the benefit of the shipowners, and that the estimate was of the gross freight without deducting advances. The evidence seems conclusive on that point, because, on looking to figures, 770] the amount of £5,941 1*s.* 2*d.* is found to be *the amount, not only of the gross freight, but of the gross freight plus the address commission.

I think we may look at all the circumstances to see what was the subject-matter of the insurance, and I think that

they show that such subject-matter was the full gross freight. Then I think, on considering the items making up the sum of £512 13*s.* 5*d.*, which Lorrain & Co. insured on their own account, that that amount consisted of advances under the charter, and to that extent the plaintiffs had no insurable interest, or it was as if they had assigned or parted with their interest to some one else, who had insured such interest in a separate and independent policy.

Whether it is to be treated as an insurance by persons who have no interest, or for an amount which has been paid under another policy, the result is the same, and the plaintiffs cannot recover. I wish to add a few words only with regard to the question of ratification. This question has long been settled by the courts of law and mercantile usage. The case is an exception to the general rule founded upon principle. The analogy of the ratification of a sale of goods which had ceased to exist at the time of ratification, which was presented to us in the argument, is not really applicable. The insurance, by the very nature of the thing, was of goods lost or not lost. As a question of mercantile convenience, I think it very desirable that a ratification of an insurance under such circumstances should be permissible.

Judgment for the defendants.

Solicitors for plaintiffs: *Hollams, Son & Coward.*
Solicitors for defendants: *Walton, Bubb & Walton.*

Where A. contracts with B. as the assumed principal of C., if C. be informed of the facts, and promises to comply with the contract made by A. as such agent, those facts alone are sufficient to justify a jury in finding that A. had original authority to make the contract when he did so: Commercial Bank *v.* Warren, 15 N. Y., 577, 580–1; Johnson *v.* Jones, 4 Barb., 369, 372.

To ratify an unauthorized act performed by an agent, it is sufficient if the principal, with knowledge of what has been done by the agent, *consents* to be bound by it and unequivocally manifests such *intent* to the other party: Keeler *v.* Salisbury, 33 N. Y., 648, 652–3; Lowenstein *v.* McIntosh, 37 Barb., 251.

But if A. have no authority originally to make a contract as agent of B., if B. on learning the facts ratify the contract, he is bound by such ratification in the same manner as if A. possessed such authority. It is an adoption *per se* and not merely presumptive evidence of original authority: Commercial Bank *v.* Warren, 15 N. Y., 577; Peterson *v.* Mayor, 17 N. Y., 449, 453–4; Moss *v.* Rossie, etc., 5 Hill, 137; Lawrence *v.* Taylor, 5 Hill, 107; Lowenstein *v.* McIntosh, 37 Barb., 251; Farmers, etc., *v.* Walworth, 1 N. Y., 433; Kent *v.* Hudson, etc., 22 Barb., 278; Grant *v.* Beard, 50 N. H., 129; Broom's Legal Max., *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur:* 7th Am. ed., 867.

After the lapse of a considerable time, circumstances may raise a presumption that an agent has informed his principal of what he had done, and that the principal has waived any objection to the transaction on account of the agent having exceeded his authority: Sage *v.* Sherman, 2 N. Y., 417; Curtis *v.* Leavitt, 15 N. Y., 47–8; Sanland *v.* Green, 40 Wisc., 431; Nor-

ris *v.* Cook, 1 Curtis's C. C., 464; Kelsey *v.* National Bank, 69 Penn. St., 426; Union, etc., *v.* Rocky Mountain, etc., 2 Colorado, 565, 571; 1 Sto. Eq. Jur., § 408; Hadden *v.* Dimmick, 31 How. Pr., 196; Weiss *v.* Morgan, 51 Miss. 21.

So after a reasonable time has elapsed: Meehan *v.* Foster, 52 N. Y., 277; Norris *v.* Cook, 1 Curtis, 464.

And even a failure to dissent within a reasonable time is sufficient or assent, and ratification will be presumed: Johnson *v.* Jones, 4 Barb., 369, 374–5; Brigham *v.* Peters, 1 Gray, 139, 147; Cairnes *v.* Bleecker, 12 Johns., 300; Greenfield Bank *v.* Crafts, 4 Allen, 447, 454–5; Burwick *v.* Dusenberry, 2 Hilton, 107, 32 How. Prac., 348; Union, etc., *v.* Rocky Mountain, etc., 2 Colorado, 565.

Where the principal on being informed of what has been done accepts a part of the fruits of the arragement, without objection, and does not repudiate the transaction, he may be held by such subsequent acts and acquiescence to have ratified the acts of the agent. In such a case, if the principal does not intend to abide by the acts of his agent, he should dissent and give notice within a reasonable time. If he fails to do so, an assent to, or ratification of, the acts of the agent will be presumed: Bridenbecker *v.* Lowell, 32 Barb., 9; Curtis *v.* Leavitt, 15 New York, 47–8; Cairnes *v.* Bleecker, 12 Johns., 300; Varina *v.* Barclay, 3 Cow., 281; Loveland *v.* Green, 40 Wisc., 431; Kelsey *v.* National, etc., 69 Penn. St. R., 426; Union, etc., *v.* Rocky Mountain, etc., 2 Colorado, 571; Richmond, etc., *v.* Stark, 4 Mason, 296.

See, however, Hanks *v.* Drake, 49 Barb., 186; Clarke *v.* Meigs, 10 Bosw., 338.

Mere knowledge of a transaction after it has taken place, and *nothing more*, is no sufficient proof of ratification: Elliot *v.* Dudley, 19 Barb., 326; Moore *v.* Westervelt, 2 Duer, 59; Clarke *v.* Acosta, 9 Bosw., 158, 162.

See Ladd *v.* Hildebrant, 27 Wisc., 135.

Where a vendee has been induced to purchase property by means of fraud on the part of the vendor, mere want of diligence in discovering the fraud does not deprive the vendee of his right to rescind because thereof; he owes the fraudulent vendor no duty of active vigilance, and if he acts promptly after actual discovery of the fraud, he has a perfect right to rescind. It seems that, as a general rule, a delay to rescind, after discovery of the fraud, does not operate as a waiver of the right, or as a confirmation of the fraudulent contract: Baker *v.* Lever, 67 N. Y., 304.

In case of an unauthorized act performed by one claiming to act as agent, if there was no relation of agency in fact, the mere acquiescence or silence of the supposed principal, is at least slighter evidence, or raises a slighter presumption, of a ratification, than it would in case of an actual agent who had exceeded his powers: Ladd *v.* Hildebrant, 27 Wisc., 135.

Acquiescence by a principal in the wrongful acts of his agent, to amount to a ratification, must have been continued for some length of time, and the principal must have been cognizant of his rights: Brass *v.* Worth, 40 Barb., 648.

See also Ladd *v.* Hildebrant, 27 Wisc. 135.

Though ratification may, it seems, be found from acquiescence: Hoyt *v.* Thompson, 19 N. Y., 208; Berwick *v.* Dusenberry, 2 Hilton, 107, 32 How, Pr., 348.

Where the act done for another is apparently for his benefit, *slight* evidence should serve to establish a ratification: Berwick *v.* Dusenberry, 32 How., 348, 2 Hilton, 107.

A subsequent ratification by a principal of the unauthorized act of a person professing to act as his agent, in order to be valid must be made with a full knowledge of the material facts affecting his rights: Seymour *v.* Wyckoff, 10 N. Y., 213; Nixon *v.* Palmer, 8 N. Y., 398; Smith *v.* Tracy, 36 N. Y., 79, 83; Baldwin *v.* Burrows, 47 N. Y., 212–216; Cobb *v.* Dows, 9 Barb., 237, 10 N. Y., 335, 341; Hays *v.* Stone, 7 Hill, 128, 3 Den., 575; Brass *v.* Worth, 40 Barb., 648; Merserole *v.* Archer, 3 Bosw., 376; Dabney *v.* Stevens, 10 Abb., N.S., 39, 2 Sweeney, 415; Owings *v.* Hull, 9 Peters, 607; Kelly *v.* Brown, 5 Gray, 108; Gillig *v.* Maas, 28 N. Y., 191; Ladd *v.* Hildebrant, 27 Wisc., 135; Weiss *v.* Baldwin, 52 Miss., 263.

The rule requiring full knowledge by the principal before he will be held to have ratified the acts of an assumed

agent does not require knowledge of his *rights*, but that he shall have full knowledge of the *facts* and *circumstances* of the transaction: Hanks *v.* Drake, 49 Barb., 202.

The adoption of one part of a transaction done under an assumed agency, enures as an adoption of the whole: Corning *v.* Southland, 3 Hill, 552; Moss *v.* Rossie, etc., 5 Hill, 137; Farmers, etc., *v.* Walworth, 1 N. Y., 433; Crans *v.* Hunter, 28 N. Y., 389; Hanks *v.* Drake, 49 Barb., 202; Grant *v.* Beard, 50 N. H., 129.

Where the plaintiff, having an account against the defendant, which was disputed by the latter to the knowledge of the plaintiff, entrusted a receipt in full to an agent, who delivered the receipt to the defendant, on being paid a part of the amount claimed, which money the plaintiff received from the agent, and then sued the defendant to recover the balance: Held, that the plaintiff, by receiving the money, ratified the act of his agent in delivering the receipt: Palmerton *v.* Huxford, 4 Den., 166.

A guardian, in purchasing land for herself, used in payment a note given her as guardian on the sale of her ward's land. The ward, upon coming of age, ratified and confirmed in writing the purchase as an investment of his estate, and released all right of action against certain sureties, named, on the bond of the guardian, but expressly excepted others. Held, that by such ratification and release, a surety so excepted therefrom was also released: Tyner *v.* Hamilton, 51 Ind., 259.

If a principal ratifies the purchase by his agent of a chattel which the vendor had no right to sell, he is guilty of a conversion, although at the time of the ratification he had no knowledge that the sale was unlawful: Hilbery *v.* Hatton, 2 Hurl. & Colt., 822.

A. agreed to furnish B. with lumber, and without any authority from B. ordered the lumber of C., representing himself as B.'s agent. C. sent the lumber to B. with a bill, in which C. was named as seller and B. as buyer. B. retained the lumber and did not notify C. he was buying the lumber of A.: Held, in an action by C. against B. for the price of the lumber, with a count in tort for the conversion, that B. was liable: Bearce *v.* Bowker, 115 Mass., 129.

Though the statute requires a contract for the sale of lands to be in writing, subscribed by the party or his agent lawfully authorized, it is not necessary that the agent should have written authority: Newton *v.* Bronson, 13 N. Y., 587.

Though an authority to *convey* lands is required by the statute of frauds to be in writing, it is otherwise of an authority to make a *contract* to convey: Lawrence *v.* Taylor, 5 Hill, 107; Worrall *v.* Munn, 5 N. Y., 229; Henry *v.* Root, 33 N. Y., 550.

And where a party, without authority, executes a contract for the sale of lands in the name of the owner, a ratification by the latter, although by parol, makes the contract valid within the statute: Newton *v.* Bronson, 13 N. Y., 587; McMillan *v.* Bentley, 16 Grant's (U. C.) Chy., 387.

But in a case where the principal could not delegate authority to the agent to make the contract, the ratification must be in writing subscribed by the principal, and in such form as to render the contract valid within the statute as one originally made by him: Newton *v.* Bronson, 13 N. Y., 587.

Though an executor or other trustee authorized to sell, in his discretion, real estate not authorized, cannot authorize an agent to contract for its sale, because it is a personal trust which cannot be delegated; yet where such a contract has been executed by an agent, the principal may render it valid by ratifying it with full knowledge of the facts. In ratifying it he exercises the personal qualities essential to the due execution of the trust: Newton *v.* Bronson, 13 N. Y., 587.

An account having been placed in the hands of an attorney by the creditor for collection, and the attorney having presented it to the debtor for payment, the debtor afterwards paid a part of the claim to another person who occupied the same office with said attorney, and who gave a receipt for the money so paid, signed by him as for said attorney, but who had no business connection with said attorney, and had no authority from him or from said creditor to receive said payment, which act was not ratified by said creditor but

was ratified by the said attorney, who never received the money so paid, and who afterwards repudiated said act on learning that his client had never received the money so paid: Held, in an action on said account, that the creditor was not bound by said payment: O'Connor *v.* Arnold, 53 Ind., 203.

A ratification relates back to the time of the original obligation: Lawrence *v.* Taylor, 5 Hill, 107; Moss *v.* Rossie, etc., 5 Hill, 137.

But as to qualifications of the rule, see Gilbert *v.* Sharp, 2 Lansing, 412; Taylor *v.* Ainslie, 19 U. C. Q. B., 85; Bird *v.* Brown, 4 Exch., 786.

Though a ratification after suit brought upon an instrument will not relate back to sustain an action not authorized when it was commenced; for the plaintiff must have a right of action at the time of the commencement of his action: Gilbert *v.* Sharp, 2 Lans., 414; McCullock *v.* Colby, 4 Bosw., 603, 5 Bosw., 477; Wattson *v.* Thibou, 17 Abb. Pr., 184; Williams *v.* Hernon, 16 Abb., 173; Moyer *v.* Scott, 30 Mich., 348.

Though such objection is waived by not being insisted upon at the trial: Ashley *v.* Marshall, 29 N. Y., 494.

So an agent sued personally upon a contract he executed without authority, on the ground that by so doing he bound himself personally, cannot defend by showing a subsequent ratification by his principal: Rossiter *v.* Rossiter, 8 Wend., 494; Palmer *v.* Stephens, 1 Den., 472.

See Gilbert *v.* Sharp, 2 Lans., 412; Hegeman *v.* Johnson, 35 Barb., 204–5; White *v.* Madison, 26 N. Y., 117.

If, after issue joined, matters constituting a defence arise, they can only be taken advantage of by supplemental answer: Williams *v.* Hernon, 16 Abb. Pr., 173; Short *v.* Hooker, 40 How. Pr., 420; Hendricks *v.* Decker, 35 Barb., 298; Brown *v.* Richardson, 7 Rob., 57; Browne *v.* Higden, West's Chy., 21; Clarke *v.* Clarke, 7 Rob., 276.

Or perhaps by original answer if the time to answer has not expired: Carpenter *v.* Bell, 19 Abb. Pr., 258; Short *v.* Hooker, 40 How., 420; Ormsbee *v.* Brown, 50 Barb., 436; Brown *v.* Richardson, 7 Rob., 57.

Though it has been held that where, in an action upon a judgment, the defendant by his answer, puts in issue the existence of a regular, valid and legal judgment, any evidence tending to show the judgment illegal or void is competent. Hence a certified copy of the judgment record, showing that since the joining of the issue the judgment has been vacated is admissible: Kinsey *v.* Ford, 38 Barb., 195; Ward Syme, 8 N. Y. Leg. Obs., 95; Brown *v.* Richardson, 7 Rob., 57; Ormsbee *v.* Brown, 50 Barb., 436.

So if a plaintiff has a cause of action and a right to a judgment when his suit is commenced, he is entitled to such judgment though he lose his title by some occurrence subsequent to action brought; he is entitled to judgment and costs: Wilkes *v.* Lion, 2 Cow., 333; Laflin *v.* Griffiths, 35 Barb., 63; Russell *v.* Butterfield, 21 Wend., 300; Coburn *v.* Palmer, 8 Cush., 124; Lawton *v.* Fitchburg, etc., 8 Cush., 230; Robinson *v.* Campbell, 3 Wheat., 212; Lessee, etc., *v.* Galloway, Peters' C. C. Rep., 299; Moyer *v.* Scott, 30 Mich., 345, 348; McLean *v.* Bovee, 35 Wisc., 27; Tobin *v.* Cleary, Irish Law Rep., 7 C. L., 17, affirmed 8 id., 366; Moak's note to Clarke's Chan., 502, ed. 1869; Adams' Eq. (3d Am. ed.), 420; 2 Pars. on Cont. (1st ed.), 294–5; Broom's Leg. Maxims, *Actus curia neminem gravabit;* Wharton's Leg. Max., id.

The doctrine of ratification applies to corporations as well as to individuals: Hecker *v.* Mayor, 28 How. Pr., 211, 18 Abb. Pr., 369; Hoyt *v.* Thompson, 19 N. Y., 208; Allen *v.* Cerro Gordo Co., 34 Iowa, 54; Lyman *v.* Norwich, 28 Verm., 560; Merchants *v.* Central, 1 Geo., 418.

Where the dealings are within the *powers* of the corporation: Curtis *v.* Leavitt, 15 N. Y., 47–8.

But see Fisk *v.* City, 26 Wisc., 23.

Otherwise when expressly forbidden: Cowen *v.* Village, 43 Barb., 49.

See Bradley *v.* Ballard, 55 Ills., 413.

As to what is a ratification: 17 Eng. Rep., 129 note; Dodge *v.* Lambert, 2 Bosw., 570; Berwick *v.* Dusenberry, 32 How., 348; National Bank *v.* Fassett, 42 Verm., 432; Allen *v.* Cerro Gordo Co., 34 Iowa, 54; Bass *v.* Chicago, etc., 39 Wisc., 636; Bass *v.* Chicago, etc., 42 Wisc., 654; Sartwell *v.* Frost, 122 Mass., 184.

What is not: 12 Eng. Rep., 377 note;

17 Eng. R., 129 note; Nixon *v.* Palmer, 8 N. Y., 398; Smith *v.* Tracy, 36 N. Y., 79; Owings *v.* Hull, 9 Peters, 607; Munger *v.* Hess, 28 Barb., 76; Manning *v.* Monaghan, 10 Bosw., 231; Deming *v.* Bailey, 10 Bosw., 258; Mawson *v.* Bland, 10 Exch., 206; Hubbard *v.* German, etc., 34 Iowa, 31; Kilkelly *v.* Martin, 34 Wisc., 525; Cuyler *v.* Merrifield, 5 Hun, 559; Prince *v.* Lewis, 31 U. C. Q. B., 244, 21 U. C. Com. Pl., 63.

An assumed agent is not responsible to the principal for his acts, even though they turn out to be injurious, provided the principal has once, with knowledge of the facts, adopted them: Corning *v.* Southland, 3 Hill, 552.

A contract for the sale of lands, made and signed by an authorized agent, but not referring to the principal, or signed in the latter's name, does not bind the principal; and in action against the latter to enforce specific performance, proof of the signer's agency is inadmissible.

So held, where a husband having authority to sell, made a contract under seal for the sale of his wife's lands, in his own name, without disclosing his agency.

Nor is the receipt of a portion of the purchase-money by the principal, and his subsequent parol promise to be bound by the contract, a ratification thereof by him.

To render a contract for sale of land, signed by an agent in his own name, binding on the principal, his agency and the principal must appear from the instrument signed: Squier *v.* Norris, 1 Lansing, 282; Galusha *v.* Hitchcock, 29 Barb., 193; Babbett *v.* Young, 51 N. Y., 238; 16 Eng. R., 452; note to Weidner *v.* Hoggett, *ante*, p 175.

The receipt of the proceeds by the owner of the stock, in ignorance of an unauthorized warranty by the agent, is not a ratification of the unauthorized engagement.

When a party claims, receives and retains the property of another, knowing that it was obtained by an unauthorized use of his name, it is a ratification of the assumed agency, which evinces his assent to the original contract. So, too, when an agent, acting within the scope of his actual *authority*, perpetrates a fraud for the benefit of his principal, and the latter receives the fruits of it, he thereby adopts the fraudulent acts of the agent.

But the mere receipt by the owner, of the proceeds of his own property, is not a ratification of a collateral contract, made without his authority, and to which he never knowingly assented: Smith *v.* Tracy, 36 N. Y., 79; Owings *v.* Hull, 9 Peters, 607; Condit *v.* Baldwin, 21 N. Y., 225; National, etc., *v.* Mineh, 53 N. Y., 144, 5 Thomp. & Cooke, 545, 5 Ins. L. J., 393; 14 Eng. Rep., 776 note; Baldwin *v.* Burrows, 47 N. Y., 199.

How far principal liable for fraud of agent: Crans *v.* Hunter, 28 N. Y., 389; Presly *v.* Parker, 56 N. H., 409; Latham *v.* Crosby, 10 Grant's (U.C.) Chy., 308; Mechan *v.* Forrester, 52 N. Y., 277.

Where the agent does not assume to act for another, but as to a part of the transaction acts for himself and for his own benefit as to a collateral matter, a subsequent ratification does not bind the principal as to that portion of the transaction: Condit *v.* Baldwin, 21 N. Y., 225; Baldwin *v.* Burrows, 47 N. Y., 212–216; Fellows *v.* Commissioners, etc., 36 Barb., 655.

When A. gives his note for part of B.'s debt in satisfaction, B. cannot avoid the compromise on the ground that the compromise was to be invalid unless all B.'s creditors assented without restoring to A. the note or what was paid on it.

So when a third person gave his note, without the knowledge of the debtor, to a creditor for part of the excess beyond the amount compromised for, a payment of such note by the debtor after the execution of the compromise agreement, although with knowledge of its character, is not such a ratification of the fraud as to avoid the compromise: Babcock *v.* Dill, 43 Barb., 577.

Where one subscribes for stock on condition that certain other shares shall be subscribed within 90 days, which fact was to be certified by certain officers of the company, a subsequent payment upon the stock, on production of the requisite certificate, does not prevent such subscriber from showing the certificate was false and fraudulent to the knowledge of the officers making it: Morris, etc., *v.* Nathan, 2 Hall, 239.

A general assignment by a debtor

providing for the payment of a fictitious debt, renders it invalid.

Where a wife thus provided for in an assignment made by her husband, delivered a release of her dower in his real estate, upon condition that if the assignment should be held valid she should receive the amount directed to be paid to her by the assignment, and if held invalid that she should have her dower out of the proceeds, and the plaintiff, a creditor, assented to these terms, and to a sale of the property in accordance therewith: Held, that this did not amount to a ratification of the assignment by him, or estop him from attacking it as fraudulent and void, and having the same set aside: American, etc., *v.* Webb, 36 Barb., 291.

Where A. by letter offered B. one-half of all he sold A.'s farm for beyond $20,000, part to be paid down and balances in from *one* to *three* years; B. sold it for $39,500, the purchaser to pay part by *conveyance of a house and lot* and the residue in instalments at *two*, *three* and *four* years. Upon the contract being delivered to A. he expressed entire approval of it, promising to pay B. by conveying to him one-half the house and lot. After the purchaser had executed the contract, however, A. refused to pay B. in any form, whereupon he sued A., claiming to recover one-half the excess of the purchase-money beyond the $20,000: Held, that as the sale negotiated by A. varied from the terms prescribed by the letter, he could not recover without showing a new promise or agreement to pay the sum claimed; and this notwithstanding A. subsequently adopted and ratified the sale: the court however holding that if B. had sued upon a *quantum meruit* he might have recovered what his services were reasonably worth: Gregory *v.* Mack, 3 Hill, 380.

Where a principal has once disaffirmed an unauthorized act by an agent he cannot subsequently affirm it: Taylor *v.* Ainslie, 19 Upper Can. C. Pl., 78.

If A. without authority from B. do an act as agent of B., he may, before ratification by B., consent to rescind such action: Walter *v.* James, L. R., 6 Exch., 124; Stilwell *v.* Staples, 19 N. Y. Rep., 401.

A contract for the sale of real estate, executed by a person who had been upon inquisition found to be a lunatic, and of whose person and estate a committee had been duly appointed, is absolutely void; and no action can be maintained thereon by the committee. The committee cannot by any act of his, in ratifying or adopting it, without the authority and direction of the court, make such a contract good: Fitzhugh *v.* Wilcox, 12 Barb., 235.

The legislature has no power to confirm proceedings in insolvency, commenced by petition of creditors, and had before a person claiming to act as judge of insolvency, but with no title to the office, which have been adjudged invalid by the decree of a competent court: Denny *v.* Mattoon, 2 Allen, 361.

When legislature may confirm invalid proceedings: People *v.* Cherritree, 5 Weekl. Dig., 65, N. Y. Court Appeals; Knapp *v.* Grant, 27 Wisc., 147; Fisk *v.* Kenosha, 26 Wisc., 23; Matter of San Francisco, 42 Cal., 513; Rooker *v.* Johnston, 49 Cal., 3; Matter of Market Street, 49 Cal., 546; Stockdale *v.* Ins. Co's, 20 Wall., 323; Iowa, etc., *v.* Soper, 39 Iowa, 112; City, etc., *v.* Norton, 13 Kans., 569; McGill *v.* Peterborough, 12 U. C. Q. B., 44; N. Y., etc., *v.* Van Horn, 57 N. Y., 473; People *v.* Detroit, 29 Mich., 343; Hawkins *v.* Com., 76 Penn. St. R., 15; Grove *v.* Todd, 41 Md., 633; Logan *v.* Williams, 76 Ills., 175; Weed *v.* Donovan, 114 Mass., 181; Hassan *v.* Rochester, 6 Lans., 185; Beloit *v.* Morgan, 7 Wall., 619, and numerous cases cited; St. Joseph *v.* Rogers, 16 Wall., 645, and cases cited; Thompson *v.* Lee Co., 3 Wall., 327; Matter of Protestant, etc., 46 N. Y., 178; Matter of Meyer, 50 N. Y., 504; Williams *v.* Duanesburgh, 66 N. Y., 129, 137, and cases cited; State *v.* Passaic, 38 N. J. Law, 57.

[1 Common Pleas Division, 771.]

June 27, 1876.

*The General Share Trust Company v. Chapman. [771

Solicitor's Lien for Costs.

The defendant, a solicitor, was employed by one H. (who was a director and promoter of a limited company then in liquidation), with the privity of three other persons, the holders as nominees of H. of certain shares in the company, to take proceedings in connection with the winding up of the company. H. deposited with the defendant the certificates of the shares for the purpose of enabling him to carry out his instructions, and the defendant received from the liquidator of the company certain checks in respect of the shares standing in the names of those persons. In the meantime H. transferred to the plaintiffs his interest in the shares, with notice of the lien and charge of the defendant thereon for his costs, and the defendant, acting upon the retainer of the plaintiffs, continued the proceedings, and ultimately received from the liquidator four several checks payable to H. and the other three persons respectively. In an action to recover these checks:

Held, that the defendant was entitled, as against the plaintiffs, to a lien upon them for his costs of all the proceedings against the company in respect of the shares.

Statement of claim. 1. The defendant is a solicitor carrying on business in London.

2. The plaintiffs, in November, 1875, employed the defendant to obtain payment from the liquidator of the West Cumberland Union Colliery Co., Limited, of four sums of money which the plaintiffs had purchased of Mrs. A. B. Charles, Miss P. M'Nicoll, Miss L. M'Nicoll, and Mr. T. O'Hagan.

3. The defendant applied to the liquidator for payment of the said moneys, and, after some correspondence, the liquidator handed to the defendant in payment of the said moneys, four checks, one for £153 3*s*., payable to the order of Mrs. A. B. Charles, one payable to the order of P. M'Nicoll for £51 1*s*. 6*d*., one payable to the order of L. M'Nicoll for £51 1*s*. 6*d*., and one payable to the order of T. O'Hagan for £51 1*s*. 6*d*., being the several amounts which the plaintiffs had purchased from the said parties, and of which the plaintiffs had employed the defendant to obtain payment as in the second paragraph mentioned.

4. The plaintiffs have applied to the defendant for the said checks, but the defendant refuses to deliver them up to the plaintiffs unless the plaintiffs pay to the defendant a sum of money claimed to be due to the defendant from the said A. B. *Charles, P. M'Nicoll, L. M'Nicoll, T. O'Hagan, [772 and other persons. The plaintiffs are willing and have offered to pay to the defendant his costs of applying for and obtaining the said checks.

5. The said A. B. Charles, P. M'Nicoll, L. M'Nicoll, and T. O'Hagan are willing and desirous that the said checks should be delivered to the plaintiffs.

The plaintiffs claim possession of the checks, damages for their detention, and such further and other relief as the nature of the case may require.

Statement of defence. The defendant, in or about the month of July, 1874, was instructed through one Henry Osborne O'Hagan (who was duly authorized in that behalf) to appear and act as solicitor for A. B. Charles, P. M'Nicoll, L. M'Nicoll, and T. O'Hagan (in the plaintiffs' statement of claim respectively mentioned), as well as for other persons in whose names certain shares in the West Cumberland Union Colliery Co. stood, in certain proceedings which were being taken in the High Court of Chancery in connection with the winding-up of the said company.

2. In pursuance of the said instructions, the defendant appeared in the course of the proceedings on behalf of the said A. B. Charles, P. M'Nicoll, L. M'Nicoll, and T. O'Hagan, and the said other persons. The moneys and checks referred to in the plaintiffs' statement of claim in this action became payable to the said A. B. Charles, P. M'Nicoll, L. M'Nicoll, and T. O'Hagan by the liquidator of the said company in respect of the shares standing in their names, in consequence of the steps taken by the defendant as their solicitor to protect their interests in the said winding-up proceedings. The costs of the defendant for the professional services rendered by him as aforesaid have never been paid, and the defendant was, at and before the date of the commencement of this action, and still is, entitled to a lien on the said moneys and checks for the amount of the said costs.

3. The said H. O. O'Hagan had been a promoter and was one of the directors of the said company, and the said A. B. Charles, P. M'Nicoll, L. M'Nicoll, and T. O'Hagan, or some of them, were holders of the said shares which were standing in their names as aforesaid as nominees of the said
773] H. O. O'Hagan. The said H. O. *O'Hagan was in fact beneficially entitled to the said shares, and had the custody of the certificates relating thereto as the beneficial owner thereof.

4. The said H. O. O'Hagan in or shortly after the month of July, 1874, with the privity of the said shareholders, gave instructions to the defendant to transact and the defendant transacted other legal business connected with the affairs of the said company. The defendant consequently

became entitled and is still entitled to considerable sums of money for costs in respect of professional services rendered and payments made by him in pursuance of the said instructions.

5. In the course of the employment of the defendant in his professional capacity as above mentioned, the said H. O. O'Hagan deposited with the defendant the certificates of the shares standing in the names of the said A. B. Charles, P. M'Nicoll, L. M'Nicoll, and T. O'Hagan, for the purpose of enabling the defendant to carry out his instructions with reference thereto, and also as a security for the costs due and to become due to the defendant in connection with the matters above alluded to. The whole of the said costs are still due and unpaid. The said certificates were afterwards given up by the defendant to the liquidator of the company in exchange for the checks in the plaintiffs' statement referred to. Under the circumstances above stated, the defendant claims to be entitled to a lien or charge on the said checks and the moneys represented thereby for the amount of the said costs.

6. The said checks had not at the commencement of this action and never have been indorsed by the persons to whose order they are made payable respectively.

7. The defendant submits that the said H. O. O'Hagan, A. B. Charles, P. M'Nicoll, L. M'Nicoll, and T. O'Hagan are respectively necessary parties to this action.

8. The claim of the plaintiffs to the said checks and to the moneys represented thereby, so far as they have any claim thereon, has arisen by means of a transfer or pretended transfer to them by the said H. O. O'Hagan of his interest therein. The plaintiffs had notice of the lien and charge of the defendant at the time *such transfer [774 was made. The said transfer or pretended transfer was in fact a device of the said H. O. O'Hagan to evade payment of the costs due to the defendant.

9. The defendant denies that the plaintiffs had offered before the commencement of this action to pay to the defendant his costs of applying for and obtaining the said checks, as alleged by the plaintiffs in the fourth paragraph of their statement of claim. The defendant also denies that the said P. M'Nicoll and L. M'Nicoll are willing and desirous that the said checks should be delivered to the plaintiffs.

Demurrer to the defendant's statement of defence, with the exception of the ninth paragraph thereof, on the ground that, as it is admitted on such pleadings that the defendant obtained the checks in the statement mentioned as solicitor

and agent for the plaintiffs, he had no lien upon the same for charges other than those payable to him by the plaintiffs.

June 1. *Petheram*, in support of the demurrer: Having admitted his retainer by the plaintiffs, and having obtained the checks by virtue of that retainer, the defendant is estopped from setting up a right to retain them as a security for charges due to him from a third person. He has, no doubt, a lien on them for his costs incurred in recovering them, but not for the costs due to him from his former clients. Before anything became payable in respect of them, the holders of the shares had parted with their interest therein to the plaintiffs. The defendant now seeks to charge the plaintiffs with the costs incurred in the proceedings taken by those persons. Having accepted the plaintiffs' retainer to obtain payment for them from the liquidator, the defendant is clearly estopped from setting up any lien upon the checks which he has obtained except in respect of costs incurred by them: *Hicks* v. *Keate* (1).

Bradford, contrà: The whole statement of defence taken together amounts only to an admission of a retainer under the circumstances therein specially set forth. The retainer by the plaintiffs was but a continuation of the defendant's 775] original employment *by H. O. O'Hagan and the three other persons mentioned.

[BRETT, J.: If the defendant had not accepted an employment under the plaintiffs, he clearly would have been entitled to set up this lien. But, is he not estopped by his acceptance of the plaintiffs' retainer?]

The plaintiffs took the shares with full knowledge of the defendant's claim; they therefore took them subject to all the burthens to which they were incident.

Petheram, in reply: It must be assumed upon this demurrer that the defendant accepted the retainer without making any condition.

Cur. adv. vult.

June 27. The judgment of the court (Brett, Denman and Archibald, JJ.) was delivered by

ARCHIBALD, J.: The question which arises upon this demurrer is whether or not the defendant has a lien for his costs upon certain checks which in his capacity of solicitor he has obtained for the plaintiffs upon the liquidation of the West Cumberland Union Colliery Company, Limited.

The defendant had been originally employed by one Henry Osborne O'Hagan (who was a director and promoter

(1) 3 Jur., 1024.

of the West Cumberland Union Colliery Company) with the privity of three other persons, the holders as nominees of O'Hagan of certain shares in the company, to take proceedings on their behalf in respect of the shares; and in consequence of the steps so taken the checks claimed by the plaintiffs were obtained by him from the liquidator. He had also done other work for O'Hagan in connection with the affairs of the company.

O'Hagan, who was the person beneficially entitled to the shares, and who had the custody of the certificates relating to them, had deposited the certificates with the defendant for the purpose of enabling him to carry out his instructions and as a security for the costs due and to become due in connection with the matters above alluded to, none of which however have been paid.

O'Hagan afterwards transferred to the plaintiffs his interest in *the shares, with notice of the lien and charge [776 of the defendant; and the defendant under these circumstances accepted the retainer of the plaintiffs.

The shares deposited with him were given up to the liquidator of the company in exchange for the checks mentioned in the statement of claim, which the plaintiffs are seeking to have delivered to them discharged of any lien in respect of charges due from O'Hagan.

We are, however, of the opinion that, under the circumstances mentioned, the only interest transferred to the plaintiffs was an interest subject to the lien already created upon the shares, of which it is admitted the plaintiffs had notice; and the fact that the defendant accepted from the plaintiffs a retainer as an attorney to recover the amount for them, does not necessarily amount to an abandonment of his claim, or entitle the plaintiffs to have the amount recovered without first satisfying the defendant's claim.

Another point was made which we disposed of in the course of the argument, viz., that, as there was an admission of the retainer, the statement of defence was invalid; but it is obvious that the whole defence must be read together as an admission of a retainer under the circumstances specially set forth; and so read it amounts to what we have stated, and constitutes a sufficient defence.

Judgment must, therefore, be given for the defendant, with costs.

Judgment for the defendant.

Solicitors for plaintiffs: *Warry, Robins & Burges.*
Solicitor for defendant: *Sidney Chapman.*

See 2 Eng. R., 628 note; 3 Eng. R., 625 note; 12 Eng. R., 462 note; Coughlin *v.* N. Y. Cent., etc., 5 Weekly Dig., 562, reversing 8 Hun, 136; Brown *v.* Mayor, 9 Hun, 587; Crotty *v.* Mackenzie, 52 How. Pr., 54; Susdorf *v.* Schmidt, 55 N. Y., 319; Zogbaum *v.* Parker, 55 N. Y., 120, affirming 66 Barb., 341; Averill *v.* Longfellow, 66 Maine, 237; Richardson *v.* Brooklyn, etc., 7 Hun, 69; Wright *v.* Tebbitts, 91 U. S. R., 252; Wright *v.* Wright, 5 Week. Dig., 42, N. Y. Court Appeals; Id., 97.

[1 Common Pleas Division, 777.]

June 28, 1876.

777] *THOMPSON v. GARDINER.

Contract of Sale—Statute of Frauds, 29 Car. 2, c. 3, s. 17—Signature to Contract in Broker's Book.

A broker acting for the plaintiff made a contract for the sale of goods to the defendant, sending a note to each party, but signing only that which was sent to the seller; he, however, entered the contract in his book in which he signed both the bought and the sold note. The defendant kept the note which was sent to him without objection until called upon to accept the goods, when he repudiated the contract, assigning for reason that the note sent to him was not signed:

Held, that the conduct of the defendant amounted to an admission that the broker had authority to make the contract for him, and consequently that his signature to the sold note bound the defendant.

Held, also, that the signed entry in the broker's book was a sufficient memorandum of the bargain to satisfy the Statute of Frauds.

ACTION for not accepting butter pursuant to contract.

The cause was tried before Brett, J., at the last spring assize at Liverpool. The contract was made by one Price acting as broker for the seller, and he delivered notes to both buyer and seller, signing the note which he sent to the seller, but not that which he sent to the buyer. He, however, entered the contract in his book, in which he signed both the bought and the sold note. The defendant kept the bought note without complaint or remonstrance for two or three weeks; and, when called upon to accept the butter, he repudiated the contract, not on the ground that he had not entered into it, but on the ground that it was unsigned, writing to the broker "You did not sign it."

It was objected, on the part of the defendant, that there was no sufficient memorandum of the contract within the Statute of Frauds.

The learned judge ruled otherwise, observing that, after receiving and keeping the bought note, the defendant could not allege that Price was not an agent to make a memorandum; and he directed judgment to be entered for the plaintiff, but gave the defendant leave to move to enter judgment for him, if the court should be of opinion that there was no sufficient memorandum within the statute.

May 24. *Gully* moved for judgment accordingly: There was *no sufficient memorandum within the Statute [778 of Frauds. The plaintiff employed the broker to sell for him. The broker made out bought and sold notes; and sent one to the plaintiff, his principal, and the other to the defendant, the buyer. The bought note sent to the defendant was not signed so as to constitute a memorandum of the contract; but the broker made an entry of the contract in his book, and signed it. The agent of one party, however, cannot by making an entry in his book behind the back of the other party bind him. All the cases in which the entry in the broker's book has been treated as a sufficient memorandum within the statute have been cases in which the broker was assumed to be agent for both parties. There was no evidence here that the broker was agent for the defendant either to make the contract or to sign the book. The defendant, it is true, retained the note for some time. That, however, is no admission that the contract had been made or signed on his behalf.

[GROVE, J.: Can the mere act of the broker of the one party throw upon the other the onus of repudiating the broker's agency?]

There was no evidence to show that it was the practice of Liverpool brokers to keep books in which contracts are entered, so as to affect the defendant with knowledge of the existence of such book. [The following cases were referred to: *Graham* v. *Masson* (1); *Thornton* v. *Charles* (2); *Thornton* v. *Meux* (3); *Sievewright* v. *Archibald* (4); *Rucker* v. *Cammeyer* (5).]

T. J. James showed cause: There was abundant evidence that the broker was agent for both parties to sign the book; and, if so, there was a sufficient memorandum within the statute. [He cited Blackburn on Sale, 2d ed., 203, 256, and *Chapman* v. *Partridge* (6).]

Gully was heard in reply.

Cur. adv. vult.

June 28. The judgment of the court (Brett, Grove, and Archibald, JJ.) was delivered by

BRETT, J.: This was an action for not accepting butter pursuant to contract. It was tried before me, and I directed judgment to *be entered for the plaintiff. A motion [779 has been made to enter judgment for the defendant in pursuance of leave reserved by me for that purpose, on the

(1) 5 Bing. N. C., 603.
(2) 9 M. & W., 807.
(3) M. & M., 43.
(4) 17 Q. B., 103; 20 L. J. (Q.B.), 529.
(5) 1 Esp., 105.
(6) 5 Esp., 256.

ground that there was no evidence of any memorandum of the contract within the Statute of Frauds. The facts were these: The contract was made with a person who must be taken to be a broker, and who was acting for the seller only, and not for the buyer. The defendant agreed upon the terms of sale with the broker. These terms were not disputed. If there was a sufficient memorandum in writing signed by or on behalf of the party to be charged, the defendant had unjustifiably refused to accept the butter. The broker sent a note of the contract to the buyer and also to the seller. He signed the note which was sent to the seller, but he did not sign that which he sent to the buyer. He, however, entered in his broker's book both the bought and the sold note, and signed them both. The butter was tendered to the defendant some time after the note was sent to him, he having kept the latter until then without complaint or remonstrance. The reason he assigned for his refusal was, not that he had not entered into the contract, but that the note sent to him was not signed. I decline to enter into the terms of the two notes, as to which was the bought and which was the sold note. The real question upon the notes on this point always turns on the person to whom the note is sent. If the broker is authorized by the buyer to make a contract, the note sent by him to the seller is the note which is intended to be the bargain, and *vice versa*. The note which was to bind the defendant here, was the sold note. We are not driven to rely on the notes in the broker's book, because the note delivered to the plaintiff (if the broker had authority to sign the memorandum) binds him. The authorities are conclusive to show that the broker acting for one of the contracting parties, making a contract for the other, is not authorized by both to bind both. But the broker who makes a contract for one may be authorized by that person to make and sign a memorandum of the contract. That has frequently been held. The question here is whether there was any evidence that the broker was so authorized. The evidence was, that a note of the bargain was sent to the buyer; and that his only objection was, not that the broker who sent it had no authority to send it, or
780] that no such contract was *made, but that the memorandum sent to him was not signed. That was ample evidence for the jury that the defendant recognized the authority of the broker to sign for him. Luckily, however, the broker did sign the note which was to bind the defendant, that is, the sold note. Then, this further fact remains, that the broker kept a book in which both bought and sold

note were entered and signed by him. I therefore think that, even if the signature to the note sent to the seller was not sufficient to bind the buyer, the signature in the broker's book was enough to satisfy the statute. The broker being a broker authorized to make a memorandum of the contract on the defendant's behalf, the entry in his book was sufficient evidence of a memorandum of the bargain signed by a duly authorized agent within the meaning of the Statute of Frauds to bind the defendant.

My Brother Grove has doubts, and wishes me to say that, in his judgment, the fact of the defendant keeping the note sent to him without objection was not sufficient to show an authority in the broker to bind him. But he thinks that, inasmuch as when the defendant made the objection he confined it to saying "You did not sign it," he thereby admitted the agency of the broker to make the contract on his behalf. He therefore agrees with me that judgment was rightly entered for the plaintiff.

My Brother Archibald authorizes me to say that he concurs in the above judgment, and in the reasons I have given.

Judgment for the plaintiff.

Solicitor for plaintiff: *S. C. H. Sadler*, for T. Bellringer, Liverpool.

Solicitors for defendant: *Whitley & Maddock*, Liverpool.

See 12 Eng. Rep.,'572 note; 15 Eng. Rep., 421 note.

The seller of land cannot act as agent for the purchaser so as to bind him by any memorandum he might make and sign himself: Adams *v.* Seales, 57 Tenn. (1 Baxter), 337; 12 Eng. R., 572 note; 15 Eng. Rep., 421 note.

Though originally much questioned, it is now well settled in England and America that the statute of frauds applies to sales of realty at auction. In such cases the auctioneer acts as agent both of the seller and the buyer. In order to make the sale valid, the auctioneer or his clerk must write down the name of the bidder and the price bid opposite the parcel of land sold. This memorandum must be made at the time of the bidding or immediately afterwards. It must be made upon some book or paper which sets forth the land sold, and the terms of sale physically annexed to such book or paper, and must so definitely refer to it as to make it a part of it, either by the physical contact or by the reference. When thus evidenced, an auction sale meets the requirements of the statute of frauds, and a court of equity will compel the payment of the money and the delivery of the deed: Jelks *v.* Barrett, 52 Miss., 315, declining to follow the cases in Virginia, Bowles *v.* Goodson, 6 Gratt., 78, and Powell *v.* McKinley, 9 Gratt., 1.

See also Adams *v.* Seales, 57 Tenn. (1 Baxter), 337.

The rule which holds the memorandum of an auctioneer sufficient to bind the parties to a sale of land and takes the case out of the statute of frauds, contemplates an agent of both parties, with authority to act for the seller and buyer. When the seller is himself present, directing and contracting the sale, and engages a crier simply to cry the property, and knock it off to the best bidder, the seller himself standing by and doing everything else except simply crying the bids, this is not such

a sale by an auctioneer as would give his memorandum the effect of constituting a contract. In such case the crier is merely an agent, with no other authority than that of securing bids and reporting the result to the seller.

A trustee divided lands into lots, and made plat thereof on paper, which was exhibited to bidders at the sale, and employed a crier to sell the property. Lot No. 2 was knocked off to Seales, as the highest bidder. The trustee, who was present, made this memorandum in writing: "Lot No. 2, 113 acres. W. R. Seales, at $30 per acre": Held, this memorandum, by itself, is insufficient to meet the requirements of the statute of frauds; nor does it refer on its face to other documents, such as plats, by which the defect could be supplied: Adams *v.* Seales, 57 Tenn. (1 Baxter), 337.

Where real estate of a debtor is sold on execution, at sheriff's sale, but no certificate of such sale nor deed for such land is ever executed to the purchaser by said sheriff, and no memorandum in writing of such sale is made by him on striking off such real estate, though the purchase money therefor be paid and said sheriff makes due return of such sale, it is within the statute of frauds and cannot be enforced: Gossard *v.* Ferguson, 54 Ind., 519.

Where B. bid off a tract of land at an auction sale, and the auctioneer immediately went to his office, some 200 yards distant, and in the absence of B. began to prepare a deed, and had reached the *habendum*, when B. came in and informed him that he would not comply with his bid; in an action brought by A., the owner of the land sold at auction, to recover the amount of B.'s bid: Held, that the requirements of the statute had not been complied with, and the plaintiff was not entitled to recover: Gwathney *v.* Cason, 74 N. C., 5, approving Cherry *v.* Long, Phillips (N. C.), 466, Christian *v.* Nixon, 11 Ired. (N. C.) Law, 1, Hardy *v.* McKesson, 7 Jones (N. C.), 569.

The case of Gwathney *v.* Cason seems to have gone upon the theory that, by stopping at the *habendum*, the auctioneer had not completed any memorandum of all the terms of the sale; the court did not pass upon the question whether he was required to make the memorandum immediately upon the fall of the hammer; or whether he could have gone the distance he did and then do so. The court held, the purchaser revoked his bid before the terms of the statute were complied with by the auctioneer.

As to how soon after the bid the auctioneer is required to make his memorandum, see Mews *v.* Carr, 1 Hurl. & Norm., 486; Smith *v.* Arnold, 5 Mason, 419; Walker *v.* Herring, 21 Gratt., 678; Horton *v.* McCartney, 53 Maine, 394; Gwathney *v.* Cason, 74 N. C., 7–10, and cases there cited; Hunt *v.* Gregg, 8 Blackf. (Ind.), 105; Ruckle *v.* Barbour, 48 Ind., 274; Gossard *v.* Ferguson, 54 Ind., 523.

[1 Common Pleas Division, 781.]

June 18, 1876.

781] *Purcell v. Sowler and Others.

Libel—Privilege by Reason of the Occasion—Comments on Matters of Public Interest.

To justify the publication in a newspaper of defamatory comments,—apart from reports of what passes in courts of justice,—it must be shown either that the person of whom the defamatory matter is written was a person whose position and character are of general interest to the whole country, or that the subject-matter dealt with is one of general interest to the whole community. It is not enough to show that the individual fills a public character of a limited kind and in a limited district, or that the subject-matter dealt with is of interest only to a small portion of the public, or to the public in a limited district.

The defendants, the proprietors of a newspaper, published a report of the proceedings at a meeting of the board of guardians of a provincial union, containing

false and defamatory matter reflecting upon the medical officer of the union workhouse:

Held, not privileged by the occasion, though the report was admitted to be *bona fide* and a correct account of what passed at the meeting.

ACTION for a libel. The statement of claim was as follows:

1. The plaintiff was at the time of the committing of the grievance hereinafter mentioned, and still is, a physician and surgeon practising at Knutsford, in the county of Chester, and was and is also the duly appointed medical officer of the Knutsford workhouse at Knutsford, which said workhouse is within the Altrincham Union for the administration of the laws for the relief of the poor.

2. The defendants were at the time of the committing of the grievance hereinafter mentioned, and still are, the printers and publishers of a daily newspaper called the Manchester Courier and Lancashire General Advertizer, printed and published at Manchester, and having a wide circulation, in particular in Lancashire and Cheshire.

3. The defendants, being such printers and publishers as aforesaid, on the 30th of December, 1875, falsely and maliciously printed and published of and concerning the plaintiff, and of and concerning him in his said profession of physician and surgeon, and of and concerning him in his said office of medical officer as aforesaid, in the said newspaper called, &c., the words following, that is to say,—"More alleged neglect at Knutsford workhouse. *At [782 the fortnightly meeting of the Altrincham board of guardians yesterday, Mr. Fullalove, the chairman of the house committee, reported that a few days ago an inmate of the house, John Oldham, of Bollington, was taken seriously ill, and the master sent a messenger for the doctor (meaning thereby the plaintiff) at about 7 o'clock in the morning. He (meaning thereby the plaintiff) did not arrive in forty minutes: the porter went to his (meaning thereby the plaintiff's) house, and told him (meaning thereby the plaintiff) that the man was dying, and that he should walk about the front of his (meaning thereby the plaintiff's) house until he (meaning thereby the plaintiff) came. On the visit of the porter, the doctor (meaning thereby the plaintiff) went to the bedroom window. When the doctor (meaning thereby the plaintiff) did arrive, the man was dead. The chairman (Mr. J. Ambler) observed that, if the doctor (meaning thereby the plaintiff) had come when first desired, he would probably have seen the man alive. Mr. Fullalove said that, when the porter went to fetch him (meaning thereby the plaintiff), he was in bed. Mr. Taberer, the master of the house, said

that that was the third time the doctor (meaning thereby the plaintiff) had served him like that. On a recent occasion, a man was brought in a cab from Wilmslow at 12 o'clock at night. The doctor (meaning thereby the plaintiff) was sent for, but he (meaning thereby the plaintiff) did not come until a quarter past 2: he (meaning thereby the plaintiff) kept five of them waiting up two hours for him. Mr. Green, Wilmslow, said that that was perhaps the most serious charge which had been brought against the doctor (meaning thereby the plaintiff). A man was found to be dying, whereupon a boy was dispatched for the doctor (meaning thereby the plaintiff), and told him (meaning thereby the plaintiff) that a man was very poorly. Subsequently the porter went; and the doctor (meaning thereby the plaintiff) paid little attention to him, although he stated that the man was dying. The fullest inquiry should be made. The case assumed a very serious aspect; and, if the case were good, the doctor (meaning thereby the plaintiff) ought to be called upon to resign." The board decided to hold an inquiry into the charges preferred against the doctor; meaning thereby and imputing to the plaintiff thereby that the plaintiff had 783] been and was guilty of gross misconduct *in his profession of physician and surgeon as aforesaid, and in his office of medical officer as aforesaid, and had acted in his said profession and in his said office negligently, improperly, and with great cruelty; whereby the plaintiff had been and was greatly prejudiced and injured in his credit and reputation, and in his profession of physician and surgeon as aforesaid, and in his office of medical officer as aforesaid, &c.

Statement of defence,—

1. The defendants admit the allegations contained in paragraphs 1 and 2 of the plaintiff's statement.

2. The defendants admit that the words set forth in paragraph 3 of the plaintiff's statement were printed and published by them, but they deny the other allegations in that paragraph contained. The defendants are public journalists, and the said words were printed and published by them as such public journalists, in a public journal, *bona fide*, without malice, and for the public benefit, and not otherwise, and were and are a correct, fair, impartial and honest report and account of proceedings of public interest and concern. Issue thereon.

At the trial before Brett, J., at the last spring assizes at Manchester, a verdict was by consent entered for the plaintiff, damages 40*s*. (with certificate), leave being reserved to move to enter a verdict for the defendants if the court should

be of opinion that the publication was privileged, it being admitted to be *bona fide* and a correct account of what passed at the meeting described.

May 16. *Edwards*, Q.C., moved to enter judgment for the defendants: The publication complained of, being admitted to be a correct account of what took place at the meeting, and to have been published *bona fide* and without malice, falls within the range of what the law holds to be privileged, being a matter of public interest, and the meeting being a public meeting authorized by act of Parliament to be held by the guardians. The rule as to privileged publication is well laid down by Cockburn, C.J., in *Wason* v. *Walter* (1). "The true criterion," he says, "of the privilege is, not whether the report was or was not ex parte, but whether it was a fair and honest report of what had taken place, published *simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected." [784 That applies with equal force to a report of the proceedings of a meeting like that in question as to proceedings in a court of justice. In *Campbell* v. *Spottiswoode* (2), the same learned judge assents to the proposition that fair comments upon a matter of public interest are privileged. In *Kelly* v. *Tinling* (3), a churchwarden having written to the plaintiff, the incumbent, accusing him of having desecrated the church by allowing books to be sold in it during service, the correspondence was published by the defendant in a newspaper, with comments on the plaintiff's conduct: and it was held that this was a matter of public interest, which might be made the subject of public discussion; and that the publication was therefore not libellous, unless the language used was stronger than in the opinion of the jury the occasion justified. Cockburn, C.J., says (4): "I cannot think that a dispute between a clergyman and his church-wardens as to what he allows to be done in his church during divine service, and the uses to which he puts part of it, viz., the vestry-room, which were the matters involved in the correspondence between them, is not a subject of public interest. The maintenance of decency and propriety in conducting public worship, and of the sanctity of the sacred edifice and all connected with it, is surely a matter of the greatest public concern."

[BRETT, J.: The conduct of a clergyman in reference to the management of his church is matter of general public in-

(1) Law Rep., 4 Q. B., 73, 94.
(2) 3 B. & S., 769, 776; 32 L. J. (Q.B.), 185.
(3) Law Rep., 1 Q. B., 699.
(4) Law Rep., 1 Q. B., at p. 701.

terest: but probably it would be otherwise with reference to the management of a charity.]

In *Henwood* v. *Harrison* (1), Willes, J., delivering the judgment of the court, says: "The principle upon which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals."

785] *In *Davis* v. *Duncan* (2), it was held that the conduct of persons at a public meeting held for the purpose of promoting the election of a candidate for a seat in Parliament, may be made the subject of fair and *bona fide* discussion by a writer in a public newspaper, and unfavorable comments made upon such conduct in the course of such discussion are privileged. The case which presses the most strongly against this argument is *Davison* v. *Duncan* (3), where it is held that the publication of matter defamatory of an individual is not privileged because the libel is contained in a fair report in a newspaper of what passed at a public meeting. The alleged libel consisted of remarks made at the meeting, in which it was suggested that the plaintiff, who had been secretary to a former Bishop of Durham, had obtained a license as chaplain to a cemetery by misrepresentations to the present bishop. Lord Campbell said (4): "It is of great consequence that the public should know what takes place in court; and the proceedings are under the control of the judges. The inconvenience, therefore, arising from the chance of injury to private character is infinitesimally small as compared to the convenience of publicity. But it has never yet been contended that such a privilege extends to a report of what takes place at all public meetings. Even if confined to a report of what was relevant to the object of the meeting, it would extend the privilege to an alarming extent. If this plea is good, a fair account of what takes place may be published, whatever harm the publication may do to private character, provided it take place at a meeting of a public nature,—a wide description, embracing all kinds of meetings, from a county meeting to a parish meeting." The commissioners in that case had no power to inquire into the conduct of the clergyman, nor was the matter one of public interest: but here it was the duty of the guardians to inquire into the conduct

(1) Law Rep., 7 C. P., 606, 622.
(2) Law Rep., 9 C. P., 396.
(3) 7 E. & B., 229; 26 L. J. (Q.B.), 104.
(4) 7 E. & B., at p. 231.

of the medical officer of the union with regard to the poor under his charge, and the matter clearly was of public interest. If a comment on such a matter is privileged, how much more so must be a fair and impartial report.

C. Russell, Q.C., and *Bigham*, showed cause: There is no privilege in this case. The meeting the proceedings of which the *defendants professed to publish was not [786 a statutory meeting, but a meeting which the guardians are empowered to hold under the regulations of the Poor Law Board. It is not unimportant to observe the heading of the libellous article,—"More alleged neglect at Knutsford workhouse." The imputation on the plaintiff was grave, charging him with breach of duty as medical officer, and with want of humanity. It cannot be said that the inquiry was in any sense a matter of public interest: it was a mere matter of internal arrangement by the guardians. *Popham* v. *Pickborn* (1) is directly in point. It was there held that, if a report made by a medical officer of health to a vestry board in pursuance of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, contains libellous matter, a newspaper proprietor is not privileged in publishing it, though without any comment. "Undoubtedly," says Wilde, B., in delivering the judgment of the court, "the report of a trial in a court of justice in which this document had been read would not make the publisher thereof liable to an action for libel, and reasonably, for such reports only extend that publicity which is so important a feature of the administration of the law in England, and they enable to be witnesses of it, not merely the few whom the court can hold, but the thousands who can read the reports. But no case has decided that the reports of what takes place at the meeting of such a body as this vestry are so privileged: indeed, the case cited in the argument is an authority that they are not." The case referred to was *Davison* v. *Duncan* (2). To be privileged, the report or the comment must be based upon truth. A public journalist has no privilege in publishing libellous matter, merely because it has been uttered at a public meeting. Then, was this a matter of such public interest as to justify the defendants in reporting it? The matter reported on was a charge of private misconduct on the part of an individual in which the general public could have no concern. The case of *Henwood* v. *Harrison* (3) carried the privilege as far as it reasonably can be carried: but the decision there turned upon the

(1) 7 H. & N., 891; 31 L. J. (Ex.). 133. (2) 7 E. & B., 229; 26 L. J. (Q.B.), 104.
(3) Law Rep., 7 C. P., 606.

ground that the subject-matter of the publication was of 787] such great national importance that a fair and **bona fide* discussion of it was of interest to all the world. But it is difficult to say that it can interest the whole world to know what has been done by an obscure medical man in a remote district of the kingdom.

Edwards, Q.C., in reply: To justify a comment on a public matter, it is not necessary that all the facts should be strictly true.

Cur. adv. vult.

June 28. The judgment of the court (Brett, Archibald, and Lindley, JJ.) was delivered by

BRETT, J.: In this case, which was an action by the plaintiff against the defendants, who are the printers and publishers of a newspaper called The Manchester Courier and Lancashire General Advertizer, for a libel, the libel consisted of a report and a comment upon matters which happened at a meeting of the board of guardians of the Altrincham Union, with reference to the conduct of the medical officer of the Knutsford workhouse, and his treatment of the poor under his charge. There is no doubt that the report and the comments were disparaging to the plaintiff; but it is to be taken that the report is a true and correct statement of what actually passed at the meeting, and that the comment was a fair comment, and that the defendants were not actuated by any malicious motives whatever. The only question is whether, the defendants having published this defamatory matter, it can be said that it was published on a privileged occasion, by reason of its being a fair comment on a matter of general public interest.

Upon the argument it was suggested that this was a matter of public interest, upon the ground that the treatment by a public medical officer of the poor under his charge is a matter of interest to everybody in the kingdom, that the poor are under the protection of the public, and therefore that the conduct of every medical officer with with regard to any of the poor is a matter of public and general interest. On the other hand, it was urged that the conduct of a medical officer in a remote district, and his treatment of the poor,—not of all the poor, but of a certain portion of the poor, viz., those of a particular district or union,—though 788] in one sense **a* matter of interest to all humane persons, is not a matter of such general interest to the public, that is, to all the public, as to make the publication of a report of what passes on the subject at a meeting of a local board of guardians privileged by the occasion. It was upon

some doubt as to which of these arguments ought to prevail that we took time to consider. After consideration, we have come to the conclusion that, where this kind of privilege is invoked, it must be shown either that the person of whom the defamatory matter is written was a person whose position and character are of general interest to the whole country, or that the subject-matter dealt with is one of general interest to the whole country; and that it is not enough to show that he fills a public character of a limited kind and in a limited district, or that the subject-matter dealt with is a matter of interest only to a small portion of the public, or to the public in a limited district, and not a matter of general public interest.

Now, as regards this plaintiff, he was shown to be a most respectable person, and, when the matter came to be investigated, it turned out that there was no real imputation upon his character or conduct. But the character of such a person can hardly be said to be a matter of public interest to the whole country. It is, no doubt, of interest to the people of the district the poor of which are committed to his professional care, but nothing more. Such a question of character, interesting to the whole country, might arise with regard to a secretary of state or a public board having to deal generally with the whole of the poor of the kingdom. But this gentleman's duties were strictly confined to a limited district, and therefore neither as to his person nor as to the subject-matter with which he had to deal can it be said that the general public could have any interest in it. It is impossible, therefore, to bring this case within the rule acted upon in this court in the case of *Davis* v. *Duncan* (1). There, the libel complained of was a report of what passed at a public meeting for the election of a member of Parliament in reference to the conduct of certain persons, with comments thereon: and it was held that the character of a member of Parliament, who has to represent *not [789 only his own particular constituency but the whole country when elected, is of such public interest to the whole country as to warrant fair comment and criticism upon his character and conduct.

Kelly v. *Tinling* (2) has perhaps gone further than any other case upon the subject. The defendant had commented in a newspaper upon the conduct of the plaintiff, a clergyman, with reference to matters occurring in the church and in the vesty-room: and the Court of Queen's Bench held that the conduct of a clergyman of the Church of England

(1) Law Rep., 9 C. P., 396. (2) Law Rep., 1 Q. B., 699.

in the recognized public worship of the kingdom was a matter of public interest which might be made the subject of public discussion, inasmuch as "the maintenance of decency and propriety in conducting public worship, and of the sanctity of the sacred edifice, and all connected with it, is a matter of the greatest public concern." In *Henwood* v. *Harrison* (1) the comments were upon the character of a person whose character individually was of no public interest, but they were made in reference to his capacity to deal with a plan for the reconstruction of the navy of England; and it was held that therefore the comments were justifiable, being made with reference to a matter of great public interest to the whole kingdom. And in *Wason* v. *Walter* (2) comments on charges made by a member of Parliament in a speech in the House of Commons impugning the character and conduct of a learned judge, were held to be privileged, on the ground that the character and conduct of a judge, who is charged to administer justice to all the subjects of the Queen, are of the highest possible public interest and concern.

In all these instances the privilege has been confined to the publication of reports or comments upon persons whose position was of public interest to the whole community, or with reference to matters of public interest to the whole community. Here, however, neither the position of the person whose conduct is commented upon nor the subject-matter with which the libel deals is of such general and public interest and importance as to bring the defendants within the protection of privilege.

790] *The motion to enter judgment for the defendants therefore fails, and the judgment entered for the plaintiff at the trial will stand.

Judgment for the plaintiff.

Solicitor for plaintiff: *C. W. Dommett*, for John Robinson Barling, Manchester.

Solicitors for defendants: *Johnson & Weatheralls*, for Stevenson, Lycett & Co., Manchester.

(1) Law Rep., 7 C. P., 606.

(2) Law Rep., 4 Q. B., 73.

CASES

DETERMINED BY THE

EXCHEQUER DIVISION

OF THE

HIGH COURT OF JUSTICE,

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE EXCHEQUER DIVISION,

AND BY THE

DIVISIONAL COURTS OF APPEAL

FROM

INFERIOR COURTS,

XXXIX VICTORIA.

[1 Exchequer Division, 336.]
May 19, 1876.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

*The Wakefield Local Board of Health, Appellants; Lee and Another, Respondents. [336

Street—"Premises fronting, adjoining or abutting"—Public Health Act, 1848 (11 & 12 *Vict. c.* 63), *s.* 69.

By the Public Health Act, 1848, s. 69, "in case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice."

The respondents' premises were divided from D. street by a small stream, but by two bridges over the stream their premises were connected with it; by means of

gates they could effectually close all communication. One of the bridges had been moved and reinstated by the respondents. The principal outlet from their premises led into W. Street:

Held (per Grove and Field, JJ.) that the respondents' premises fronted and abutted upon D. street within the meaning of the foregoing enactment.

Per Cleasby, B., hesitating, that the premises adjoined D. Street.

CASE stated by justices of the peace for the borough of Wakefield, under 20 & 21 Vict. c. 43.

At a petty sessions held on the 10th of March, 1875, a complaint was preferred by the appellants under the Public Health Act, 1848, s. 69 (1), charging that prior to and on the 337] 3d day of April, *1872, and thenceforward until after the service of the notice next mentioned, a street called Dyehouse Lane, situate within the district of the appellants' board (not being a highway within the meaning of the statutes in that behalf) was not sewered, levelled, paved, flagged, and channelled to the satisfaction of the said board: whereupon the said board did, on the 15th day of November, 1872, by written notice in the form or to the effect prescribed by the statutes in that behalf, and dated the 3d day of April, 1872, to the respective owners and occupiers of the premises fronting, adjoining, and abutting upon such part of the same street as so therein required to be sewered, levelled, paved, flagged, and channelled, require the said owners to sewer, level, pave, flag, and channel the said street within six weeks from the service of the said notice in manner in the said notice described; that the said notice was not complied with as by law required; and, therefore, the said board thought fit to execute, and did thereafter execute the works mentioned and referred to therein; that the proportions of the expenses incurred by the said board in so

(1) By the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 69: "In case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag or channel the same within a time to be specified in such notice; and if such notice be not complied with, the said local board may, if they shall think fit, execute the works mentioned or referred to therein, and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor or, in case of dispute, as shall be settled by arbitration (having regard to all the circumstances of the case) in the manner provided by this act; and such expenses may be recovered from the last-mentioned owners in a summary manner, or the same may be declared by order of the said local board to be private improvement expenses, and be recoverable as such in the manner hereinafter provided."

The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 343, repeals the Public Health Act, 1848; but s. 150 of the Public Health Act, 1875, contains similar provisions to the enactment above set out.

executing the said works to be paid by the respective owners of premises so fronting, adjoining, and abutting as aforesaid, according to the frontage of their respective premises, were afterwards (to wit), on the 27th day of April, 1874, duly settled by the surveyor of the said board, having regard to all the circumstances of the case, and pursuant to the statutes in that behalf; that notice of the amount of the said proportions so settled by the said surveyor was, in accordance with the statutes in that behalf, more than three calendar months before the 3d day of February, 1875, being the day of complaint, namely, on or about the 9th day of June, 1874, duly given to all the said owners, and the respective proportions of the said expenses to be paid by the said owners respectively had theretofore and more than three calendar months before the date of the complaint been duly demanded of all the said owners, but that the respondents, two of the said owners within the meaning *of the [338 statute in that behalf made, had not paid, but had refused to pay their proportion of the expenses so due from them as aforesaid, amounting to the sum of £145 13*s.* 5*d.*, nor had paid, but had refused to pay the interest in respect of the said sum by law payable by them to the said board, and had not, within the time limited by the statute in that behalf and in manner thereby prescribed, disputed the same; and that there was therefore then due from them to the said board in respect of the premises the said sum of £145 13*s.* 5*d.*, and the further sum of £4 14*s.* 4*d.* for interest on the said first-mentioned sum pursuant to the statute in that behalf, making together the sum of £150 7*s.* 9*d.* Wherefore it was prayed that proceedings might be taken on behalf of the said board for recovery thereof.

At the hearing the respondents' solicitor admitted the regularity of the preliminary proceedings taken by the board, and that Dyehouse Lane was a street repairable by the owners of property fronting, adjoining, or abutting thereupon.

The street called Dyehouse Lane was situate within the appellants' district, and on the east side of the stream called the River Chald or Ings Beck, which divided the townships of Wakefield and Alverthorpe-with-Thornes, and also divided the premises of which the respondents were owners from Dyehouse Lane. There were two communications with the respondents' premises out of Dyehouse Lane and over the beck by means of two bridges. One of these bridges was made of brick, arched over the beck, and might be used by horses, carts and other carriages, and by foot-passengers. The other bridge was a wooden foot-bridge,

and could only be used by foot-passengers. The respondents had gates on their own premises, by means of which they could at their own will and pleasure effectually close all communication between their premises and Dyehouse Lane, and these gates were the only obstructions to the free ingress and egress over the bridges to and from the respondents' premises; but it was stated by one of the respondents that he had known only one cart go over the brick bridge within the last ten years. These bridges had directly communicated between the respondents' premises and Dyehouse Lane for a great number of years, but there was no evidence adduced showing by whom they were erected. It was 339] proved that they *had been in existence for fifty years or upwards, and it was also proved that the wooden foot-bridge was removed by the respondents at their own cost from its original position some seven or eight years ago, and that it still communicated between their premises and Dyehouse Lane. It was not proved by whom either of the said bridges had been repaired, or that they had ever been repaired by the respondents, except so far as the wooden foot-bridge was altered and repaired by them on its removal as aforesaid.

The respondents admitted that they had cleansed or paid for the cleansing of the stream called Chald or Ings Beck up to the middle thereof coextensive with their premises. The respondents proved that the principal entrance used to their premises was from the street called Westgate, in Wakefield, and not from either of the bridges.

The appellants contended, through their counsel, that the Chald or Ings Beck, was a fence bounding the respondents' property; and that, as the respondents had two communications from Dyehouse Lane over the beck by means of an arched bridge for carts as well as foot-passengers, and a wooden bridge for foot-passengers, their premises fronted, adjoined, or abutted upon Dyehouse Lane, in respect of the whole of the frontage of their premises coextensive with the stream called Chald or Ings Beck.

The respondents contended through their solicitor that no part of their property fronted, adjoined, or abutted upon Dyehouse Lane, and produced a conveyance, dated the 11th of July, 1845, of the land and premises in respect of which the present claim was made: upon the conveyance was indorsed a plan of the premises purporting to be thereby granted. According to this plan, the land of the respondents extended only as far as the bank of the stream next their property. They further contended that no part of the

stream called Chald or Ings Beck, or the two bridges crossing over it, formed part of the premises in the said conveyance mentioned; that, as the principal entrance to their premises was from the street called Westgate, they could not be owners of premises fronting, adjoining, or abutting upon Dyehouse Lane within the meaning of the act; that the centre of the stream formed the boundary between the township of Wakefield and the township of *Alver- [340 thorpe-with-Thornes, and that, supposing the respondents had any right to the stream, it would only be as an easement to the centre thereof in the township of Wakefield, and that the other half of the said stream would therefore front, adjoin, and abut upon Dyehouse Lane in the township of Alverthorpe-with-Thornes; that the respondents could not maintain an action for damages done to the bridges crossing the stream, and that under the circumstances they could not be held liable to pay any proportion of the cost of repairing Dyehouse Lane, it being divided from their premises by the stream as before mentioned.

The appellants' counsel argued in reply that, if the respondents were owners up to the middle of the stream, it was quite clear that they were owners up to the street, for the other half of the stream from the centre thereof was portion of the street, and therefore the respondents' premises fronted, adjoined, and abutted upon Dyehouse Lane.

The justices dismissed the complaint.

The question of law arising upon the foregoing case was, whether the respondents were liable to pay to the appellants a portion of the cost of sewering, levelling, paving, flagging, and channelling Dyehouse Lane.

May 18. *John Forbes*, for the appellants: The decision of the justices in dismissing the complaint was wrong. The respondents' premises fronted, adjoined, and abutted upon Dyehouse Lane. The authorities bearing upon the subject support the contention for the appellants: *School Board for London* v. *Vestry of St. Mary, Islington* (1), and *Baddeley* v. *Gingell* (2), are conclusive in their favor. *Reg.* v. *Newport Local Board of Health* (3), establishes that the question of direct benefit is not material, and *Mayor &c. of Manchester* v. *Chapman* (4), shows that even a wall standing on the respondents' own ground would not separate their land from Dyehouse Lane so as to exempt them from liability.

Sanderson Tennant, for the respondents: The facts in

(1) 1 Q. B. D., 65.
(2) 1 Ex., 319.
(3) 3 B. & S., 341; 32 L. J. (M.C.), 97.
(4) 37 L. J. (M.C.), 173.

the authorities cited on behalf of the appellants do not resemble those in the present case. The respondents have
341] only an easement over the *stream, and cannot be charged in respect of it. *Oldaker* v. *Hunt* (1), which at first may seem to show that the respondents are adjoining owners, really turned upon the meaning of the word "interested" in the Public Health Act, 1848, s. 145. But even if the respondents were seised of the whole bed of the stream, they would not be such owners of land as are liable to be charged, for they derive no benefit from their ownership: *Plumstead Board of Works* v. *British Land Co.* (2).

John Forbes replied.

Cur. adv. vult.

May 19. The following judgments were delivered:

CLEASBY, B.: The question to be decided is whether the respondents' premises have been brought within the terms of the 69th section of the Public Health Act, 1848, and whether they can be said to be "fronting, adjoining, or abutting upon" Dyehouse Lane. The material facts may be shortly stated as follows: A narrow stream runs between the respondents' premises and Dyehouse Lane. It seems clear that the whole of the bed of this stream does not belong to the respondents, and the evidence before us tends to show that their property does not extend further than the edge of the bank next their land. Two bridges form the means of communication between the respondents' premises and the street; one of them is of brick, but it was not clearly proved to whom it belonged; it had been only once crossed by a cart during ten years. The other bridge was of wood, and appeared to belong to the respondents, for they had removed it, and this act could only be justified on the ground of ownership. The respondents could for all practical purposes prevent any one from using the bridges without their consent. Upon these facts we have to determine whether the respondents are liable to pay the amount claimed from them. I do not consider the words used in the statute synonymous; I think that they were carefully inserted, and that they have distinctive meanings. I think that the respondents' premises do not "abut" upon
342] Dyehouse Lane, because *the stream intervenes between them, and I do not think the bridges make any difference as to this. I may remark that if the respondents' premises do either front, adjoin, or abut upon Dyehouse Lane, they will not be exempt from liability upon the

(1) 6 D. M. & G., 376.
(2) Law Rep., 10 Q. B., 203; explaining *Lord Northbrook* v. *Plumstead Board of Works*, Law Rep., 7 Q. B., 183.

ground that for practical purposes they gain no benefit from their proximity to the lane: owners and occupiers falling within the provisions of the statute are to be assessed according to their frontages, and the argument that those who derive no advantage are not bound to pay is not warranted by the words of the statute. This seems to be established by *Reg.* v. *Newport Local Board of Heath* (1). I hardly think that upon the facts stated the respondents' premises fronted the lane. The most important word is "adjoining." Now it seems to me that, as the stream is very small, the premises are not really separated from the lane, and may be said to adjoin. The question is substantially of fact, and the answer might be different if the stream had been so broad and deep as to require to be crossed in a ferry. I should be much disposed to abide by the view of the justices who had before them the materials for arriving at a proper conclusion, and to refrain from overruling their decision; but, as my learned Brothers concur in holding the judgment of the magistrates to be wrong, I do not dissent from the conclusion to which they have come. In my opinion, with the exception of the case which I have already mentioned, the authorities cited in the course of the argument do not throw any light upon the question before us. The decision in *Baddeley* v. *Gingell* (2) turned upon the words of a different statute; the question was whether certain premises could be said to lie within a street; it depended chiefly upon the circumstances that they had some frontage to it, and that the only mode of access to them was from the street. In *School Board for London* v. *Vestry of St. Mary, Islington* (3) the judges considered it the most material circumstance for their decision that the appellants' ground had no other outlet except by passing into a street, and therefore they held that the buildings standing upon the appellants' ground formed the street, though they were separated from *it. The facts of the present case [343 are widely different, and consequently *Baddeley* v. *Gingell* (2) and *School Board for London* v. *Vestry of St. Mary, Islington* (3) have no bearing upon it.

GROVE, J.: In my opinion the appellants are entitled to judgment. I quite admit that if the question to be decided were really of fact, we ought not to interfere with the decision of the magistrates; but what we have to determine is whether, upon the facts stated, the respondents' premises are really "fronting, adjoining, or abutting upon" Dye-house Lane. Except in mathematics, it is difficult to frame

(1) 3 B. & S., 341; 32 L. J. (M.C.), 97. (2) 1 Ex., 319. (3) 1 Q. B. D., 65.

exhaustive definitions of words; they must be construed with reference to the subject-matter to which they are applied. Now it is to be observed that the narrow stream is crossed by two bridges, and that these bridges are under the control of the respondents. There is for practical purposes no division by intervening land, and I think that the respondents' premises may be said in popular language to abut upon the lane, for the bridges, so far as appears, are useful only to them; and I also think that they may be said to front the lane; and further, I do not say that they may not adjoin.

I think that we may derive some assistance from the authorities cited before us. *Baddeley* v. *Gingell* (1) went much further than is requisite to support the view which I take; the houses rated in that case were situate in a yard, and were separated from the street by other buildings, and yet they were held to be within the street; the property of the present respondents is not divided from Dyehouse Lane by any intervening erections. A similar remark is applicable to *School Board for London* v. *Vestry of St. Mary, Islington* (2). It was there held that buildings separated from a street by intervening houses "formed" the street, and the Lord Chief Justice seemed to be of opinion that "forming a street" must receive much the same construction as "within a street." Now if we take the view least favorable to the appellants, and if we hold that the respondents' property does not extend beyond the bank immediately adjoining thereto, I still think the premises "front" and "abut upon" Dyehouse Lane: nothing like a wall or a fence exists
344] between them. I think that the words of *the statute must be construed in their ordinary meaning, and that the facts of the present case fall within them.

My brother Field, who was present during the argument of this case, concurs in the result at which I have arrived, although he may not fully agree with all my reasons.

Case remitted to Justices.

Solicitors for appellants: *Pitman & Lane*, for Brown, Wilkin & Scott, Wakefield.

Solicitor for respondents: *George Badham*, for J. & J. E. Marsden, Wakefield.

(1) 1 Ex., 319. (2) 1 Q. B. D., 65.

As to construction of word "fronting" in statute: Philadelphia *v.* Eastwick, 35 Penn. St. R., 75; Phil. *v.* R. R. Co., 33 Penn. St. R., 41; Morrison *v.* Hershire, 32 Iowa, 271.

Of "abutter:" 2 Dillon's Munic. Corp. (2d ed.), § 597.

Of "contiguous:" Arkell *v.* Commerce Ins. Co., 7 Hun, 455, 4 Weekly Dig., 348.

Of "adjacent:" People *v.* Schermerhorn, 19 Barb., 540, 556; Peverelly *v.* People, 3 Park. Crim. Rep., 59, 69.

Of "adjoining:" Peverelly *v.* People, 3 Park., 59; Holmes *v.* Carley, 32 Barb., 440, 31 N. Y., 289.

[1 Exchequer Division, 344.]

May 20, 1876.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

THE MAYOR, ALDERMEN AND BURGESSES OF SCARBOROUGH, Appellants; THE RURAL SANITARY AUTHORITY OF THE SCARBOROUGH POOR LAW UNION, Respondents.

Nuisance—Abatement—Prohibition—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 91, 94, 96.

The appellants, who were the urban sanitary authority of S., deposited in a field ashes and refuse collected in S., in order that the same might be removed by certain farmers, with whom they had contracted for the purchase thereof: the appellants were not the owners or tenants of the field, and they exercised no control over the ashes and refuse after the same were deposited: the deposit formed a nuisance. An order was made under the Public Health Act, 1875, s. 96, by justices against the appellants, for the abatement of the existing nuisance and for the prohibition of its recurrence:

Held, that so much of the order as directed an abatement was bad, for it prescribed an act, the execution of which might involve the committal of a trespass; but that so much of the order as prohibited a recurrence was good, for it was the appellants' act which created the nuisance.

CASE stated by two justices of the peace for the North Riding of Yorkshire, under 20 & 21 Vict. c. 43.

At a petty session holden at Scarborough on the 23d of March, 1876, a complaint was heard, charging that on the 19th of February then last there existed in or upon premises situate at Stone Haggs, in the township of Seamer, a nuisance, to wit, a deposit of foul manure, which was caused by the act of the appellants, who were the urban sanitary authority for the borough. At the hearing *it was [345 proved that a deposit of foul manure existed in a field situate at Stone Haggs, in the township of Seamer, between the 27th of December, 1875, and the 19th of February, 1876; that the field was in the occupation of Ann Woodall and adjoined the high road; that the heap of deposit was near to the fence adjoining the road, and about one hundred and fifty yards from the line of railway from Scarborough to York; that the appellants by their servants, carts and horses, led the manure and deposited it in the field in question; that there was a large daily traffic on the road adjoining the field containing the deposit, and that complaints had been made to the inspector of nuisances by persons using the road in question. It was also proved that the deposit was a nuisance, and injurious to health, and was so from the time it was tipped from the appellants' carts into the field.

On the part of the appellants it was proved that their foreman of the scavenging department had contracted for the sale of ashes, manure, and refuse collected in Scarborough, to six farmers in Seamer and its neighborhood, and for delivery thereof to them in the field in question; that the appellants had no interest either as owners or tenants of such field, but that the purchasers of the ashes paid the tenant for the use of the field for the purpose, and that the purchasers agreed to lead the ashes away to their respective farms as soon as possible after delivery thereof by the appellants, or otherwise to cover up the ashes so as to prevent a nuisance; that the purchasers contracted to pay the appellants an agreed sum for every ton of ashes delivered in the field, and that after delivery thereof the ashes remained subject to the exclusive order of the respective purchasers; that the deposit referred to in the complaint was made by authority of the appellants under the contract above mentioned, and by the order of the purchasers.

On the part of the respondents it was urged that the appellants having themselves, by their servants and vehicles, led and deposited the manure in the field in question, were liable, and that under s. 255 of the Public Health Act, 1875, which provides that, where any nuisance appears to be wholly or partially caused by the acts or defaults of two or more persons, proceedings may be taken against any one of them, the appellants, notwithstanding any default on the part of the farmers contributing to increase the nuisance, 346] *might be called upon to abate the same, and the recurrence thereof might be prohibited.

On the part of the appellants it was contended that, as they deposited the ashes in the field under the contract referred to and by order of the purchasers, upon the deposit the delivery was complete to such purchasers, and that after the delivery the appellants ceased to have control or responsibility in respect of such deposit; and that as they were neither owners nor occupiers of the field, the appellants had themselves no power to remove the deposit or to comply with any order which might be made for the abatement of the nuisance complained of.

The justices adjudged the charge to be proved, and ordered the appellants, within one calendar month from the date of their order, or a true copy thereof, to abate the nuisance by covering over or disinfecting the deposit, or so much thereof as then remained in the field, so that the same should no longer remain a nuisance or injurious to health. And the justices being satisfied that, notwithstanding the

nuisance might be abated, the same was likely to recur on the premises, did by the same order prohibit the appellants from causing or permitting any foul manure or other matter to be deposited upon the said premises in such manner as to cause the recurrence of the nuisance. The question submitted for this court was, whether on the facts above stated the appellants were liable to be called upon to abate the nuisance complained of, in manner and form as directed in the said order, and thereafter to discontinue the delivery of the ashes on the field in question.

If the court should be of opinion that the order had been legally and properly made, and the appellants were liable as aforesaid, then the order was to stand; bnt if the court should be of a contrary opinion, then the complaint was to be dismissed.

A. W. Simpson, for the appellants: The order is wholly bad, and cannot be maintained under the Public Health Act, 1875, ss. 91, 94, 96 (1). The appellants did not create the nuisance complained *of; no evidence appears to [347 have been given that the manure was offensive whilst it was conveyed to the field, and the tipping was a matter which lasted but for an instant, and after the tipping the appellants had no control over the deposit; but by this order they are made liable for the negligence of the purchasers in allowing the deposit to accumulate; the reasoning of Bram-

(1) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 91, "For the purposes of this act . . . (4,) any accumulation or deposit which is a nuisance or injurious to health . . . shall be deemed to be nuisances liable to be dealt with summarily in manner provided by this act: provided, first, that a penalty shall not be imposed on any person in respect of any accumulation or deposit necessary for the effectual carrying on any business or manufacture, if it be proved to the satisfaction of the court that the accumulation or deposit has not been kept longer than is necessary for the purposes of the business or manufacture, and that the best available means have been taken for preventing injury thereby to the public health."

Sect. 94: "On the receipt of any information respecting the existence of a nuisance the local authorities shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose."

Sect. 96: "If the court is satisfied that the alleged nuisance exists, or that although abated it is likely to recur on the same premises, the court shall make an order on such person requiring him to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance within a time specified in the order, and to do any works necessary for that purpose; or an order prohibiting the recurrence of the nuisance, and directing the execution of any works necessary to prevent the recurrence; or an order both requiring abatement and prohibiting the recurrence of the nuisance."

well, B., in *Murphy* v. *Caralli* (1), is very much in the appellants' favor.

[CLEASBY, B.: The manure is a nuisance from the very moment when it is tipped at the heap.]

The appellants are not tenants of the field; and the authorities show that it is only the occupier of the place where a nuisance exists who can be held responsible for injury arising therefrom; even a lessor is not liable for a nuisance during the currency of the lease, unless perhaps he has let the property knowing that the nuisance then existed: *Gwinnell* v. *Eamer* (2). The appellants have not been guilty of any wrong, and, therefore, no duty is imposed upon them to take care of the manure after it has passed out of their possession: *Brown* v. *Mallett* (3). They are a public body discharging duties important to be fulfilled for the public
348] *benefit; and if the order of abatement and prohibition be allowed to stand, they will be seriously hampered in the performance of the functions assigned to them.

[GROVE, J.: So far as appears from the statements in the case, the appellants may take other means of disposing of the ashes and refuse collected in Scarborough, and may thereby avoid the creation of a nuisance. They cannot rely upon the maxim, *Nemo tenetur ad impossibilia.*]

James Patterson, for the respondents.

[CLEASBY, B.: That part of the order which relates to a prohibition of the recurrence of the nuisance appears to be good; but it seems difficulty to support that part which directs an abatement.

GROVE, J.: How is an order to be enforced which perhaps cannot be obeyed without committing a trespass? (4)]

In *Brown* v. *Bussell* (5) an order was upheld directing the appellant to abate a nuisance which did not exist upon his own land.

[GROVE, J.: That case is not in point; for there the appellant was to execute upon his own premises what was necessary to prevent the nuisance; here the appellants have no power to go into the field to remove or cover up the deposit without the occupier's consent.]

If the order stands as to the abatement, the appellants will probably find means to comply with it.

CLEASBY, B.: The order consists of two parts, the one as to abatement, the other as to prohibition; I think the for-

(1) 3 H. & C., 462, at p. 466.
(2) Law Rep., 10 C. P., 658.
(3) 5 C. B., 599.
(4) In *London and South Western Ry. Co.* v. *Webb*, 15 C. B. (N.S.), 450, the Court of Common Pleas refused to grant an injunction, which could not be obeyed without committing a trespass.
(5) Law Rep., 3 Q. B., 251.

mer clearly bad, the latter clearly good. Upon the facts stated, it is quite plain that a nuisance was created by the appellants; the deposit of the manure necessarily involved the accumulation of matter injurious to the public health: the act of depositing the ashes and refuse was the act of the appellants, and therefore they were rightly directed to discontinue it; but as they are not occupiers of the field, they cannot lawfully be ordered to abate the nuisance by covering over or disinfecting the heap.

*GROVE, J.: I am of the same opinion. It is the [349 duty of the appellants to find some place where the ashes and refuse may be deposited without creating a nuisance; it is not stated in the case that they have taken the best available means for preventing injury to the public, so as to bring themselves within the protection of the first proviso in s. 91 of the Public Health Act, 1875; for anything that appears, many other means may exist whereby the refuse may be carried away from Scarborough without producing inconvenience to any one; therefore the part of the order prohibiting the recurrence of the nuisance must stand. I think, however, that the part directing abatement of the existing nuisance cannot be upheld; for it directs the performance of that which may be illegal. The order is good in part, and also bad in part.

Order quashed as to abatement; confirmed as to prohibition.

Solicitor for appellants: *Lammin.*
Solicitors for respondents: *Sharp & Ullithorne.*

[1 Exchequer Division, 352.]

April 29, 1876.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

*CODD, Appellant; CABE, Respondent. [352

Arrest—Warrant—Offence less than Felony.

When a warrant has been issued to apprehend a person for an offence less than felony, the police officer who executes it must have the warrant in his possession at the time of arrest.

The appellant was summoned to answer an information charging him with trespass in pursuit of conies; as he did not appear in obedience to the summons, a warrant was issued for his apprehension. The respondent, being a police officer to whom the warrant was directed, but not having it in his possession, attempted to arrest the appellant, who thereupon committed an assault upon him:

Held, that the appellant could not be convicted upon an information charging him with assaulting the respondent in the execution of his duty.

CASE stated by justices of the peace for Devonshire, under 20 & 21 Vict. c. 43.

At a petty sessions, holden at Totness, on the 20th of December, 1875, an information was heard, charging that the appellant, on the 16th of October, 1875, unlawfully did assault the respondent, he then being one of the constables for the county of Devon, duly appointed and in the due execution of his office and duty as such constable.

It was proved that the appellant was summoned to answer an information laid before a justice for Devonshire, and charging him with a trespass in the daytime in search of 353] conies, and that he was *duly served with the summons, but that he failed to appear in obedience thereto; thereupon a warrant, on the 6th of April, 1874, was issued for his apprehension and placed in the hands of one of the Devon county constables. The appellant was a miner, and then resided in the parish of Stoke Gabriel, which adjoined the parish of Berry Pomeroy, where the offence of trespassing in search of conies had been committed. The warrant to apprehend was addressed: "To the constables of the parish of Stoke Gabriel, in the county of Devon, and to all other peace officers in the said county." In accordance with the usual regulation, when a warrant was issued by a magistrate for the apprehension of a person, the constables throughout the county were informed through the chief constable that a warrant was in existence for the apprehension of the appellant.

The appellant was not met with by the police until the 16th of October, 1875, when the respondent in uniform met the appellant in the parish of East Portlemouth, in the county of Devon, and said to him: "Is your name William Codd?" The appellant answered "Yes." The respondent then said: "I apprehend you under a warrant for not appearing at a Totness petty sessions to answer a summons, and you must go with me." The appellant said in reply: "Not to-day." There was no evidence that the appellant made any demand to see the warrant, but the warrant at that time was not in the personal possession of the respondent. The respondent then endeavored to apprehend the appellant, who used great violence in resisting the attempted arrest, and inflicted serious injuries upon the respondent. For the time the appellant effected his escape, but he afterwards surrendered himself into the custody of the police.

The solicitor for the appellant took the objection that the attempted arrest was illegal, because the warrant of the 6th

of April, 1874, was not in the possession of the respondent when he attempted to arrest the appellant, and therefore he was not at that time acting in the execution of his duty as constable.

The justices convicted the appellant, and adjudged him to be imprisoned in the Devon county jail, and there to be kept to hard labor for six months (1).

*The question for the opinion of this court was, [354 whether the warrant of the 6th of April, 1874, having been issued by a justice of the peace for the county of Devon for the apprehension of the appellant for disobeying a summons, and being in the hands of the Devon county constabulary, the respondent, as one of the officers of the same force, being then on duty in uniform, but not having the warrant in his own personal possession at the time of the attempted arrest, was legally justified in attempting to arrest the appellant.

April 28. *W. M. St. Aubyn*, for the appellant: The conviction for the assault upon the respondent cannot be upheld; the facts of this case cannot be distinguished in principle from those in *Galliard* v. *Laxton* (2). The offence for which the summons had been issued had been committed long before the respondent endeavored to take the appellant into custody; therefore the attempted arrest was illegal: *Reg.* v. *Marsden* (3).

[BRAMWELL, B.: That case turned upon the circumstance, that the original offence having ceased there was no fresh pursuit; it has no bearing upon the present facts.]

The appellant had not been guilty of felony; the offence in respect of which he had been summoned was punishable summarily; and as he had been duly served with the summons, he might have been convicted in his absence, when he failed to appear in obedience thereto (4); this shows that he ought not to be treated as a criminal, and that the respondent ought not to have attempted to arrest him without having the warrant in his possession.

M. W. McKellar, for the respondent: In *Galliard* v. *Laxton* (2) the warrant to arrest was issued for the non-payment of money under a bastardy order; it was in the nature of civil process, and very much resembled a writ of *capias ad satisfaciendum;* therefore the officer was bound to have it with him when he attempted to arrest the person named in it. The distinction is between civil and criminal process;

(1) Under the Prevention of Crimes Act. 1871 (34 & 35 Vict. c. 112), s. 12.

(2) Law Rep., 1 C. C. R., 131.

(3) 2 B. & S., 368; 31 L. J. (M.C.), 123; 1 Am. Law Reg., N.S., 305.

(4) Under 11 & 12 Vict. c. 43, s. 2.

if the arrest be for a crime, it is not necessary that the con-
355] stable should have the warrant in his possession; *and a game trespass is clearly a criminal offence: *Cattell* v. *Ireson* (1). It is only requisite that the warrant should be properly directed. In *Reg.* v. *Sanders* (2) Kelly, C.B., said: "If the warrant had been specially directed to the police constable, or generally to all other constables and peace officers of the division, the arrest would have been lawful." Here the warrant was without doubt properly directed.

[BRAMWELL, B.: *Reg.* v. *Sanders* (2) does not assist the contention for the respondent; for in that case the constable had the warrant in his possession at the time of the assault; the remark of the Lord Chief Baron must be understood to have been uttered with reference to the facts proved at the trial.]

It is submitted that as the appellant was well aware of the reason why the respondent wished to arrest him, there was no necessity to give further intimation thereof by producing the warrant: in 1 East, P. C., 319, it is said: "It was ruled in *Mackallay's Case* (3), that if the party know the officer and his business, it is not necessary to give express notice thereof."

[DENMAN, J.: In *Reg.* v. *Chapman* (4), Hannen, J., followed the authority of *Galliard* v. *Laxton* (5).]

W. M. St. Aubyn did not reply.

Cur. adv. vult.

April 29. The following judgments were delivered:

BRAMWELL, B.: The conviction was wrong, and must be quashed. The warrant to arrest the appellant had been issued in respect of an offence punishable upon summary conviction (6); and I think that *Galliard* v. *Laxton* (5) is in point to show that, as regards the possession of the warrant by a police officer at the time of taking into custody, no difference exists between arrest upon civil process and arrest for crime other than felony. In the judgment delivered in the case which I have mentioned, the distinction is drawn between arrest for felony and arrest upon other grounds; and the reason is that a police officer can always arrest
356] *and detain a person whom he reasonably suspects to have committed a felony (7), but as a general rule, subject to certain exceptions mostly created by statute, he cannot

(1) E. B. & E., 91.
(2) Law Rep., 1 C. C. R., 75.
(3) 9 Rep., 69.
(4) 12 Cox, C. C., 4.
(5) 2 B. & S., 363; 31 L. J. (M.C.), 123; 1 Am. Law Reg., N.S., 305.
(6) Under 1 & 2 Wm. 4, c. 32, s. 30.
(7) See *Beckwith* v. *Philby*, 6 B. & C., 635; as to what is reasonable suspicion, see *Hogg* v. *Ward*, 3 H. & N., 417.

arrest without warrant a person not charged with felony. I have always held it to be clear law that a person not charged with felony shall have the opportunity of seeing the warrant when he is taken into custody; and I should have arrived at the conclusion that the present appellant is entitled to judgment, even although there had been no authority in his favor. We have consulted some of the other judges, and they agree with us that the decision of the justices cannot be upheld. Although the appellant displayed great violence, yet it is not expressly found by the justices that he used more force than was necessary to prevent his apprehension, which was unlawful; and, therefore, as the case stands, he has not been guilty in law of even a common assault.

MELLOR, J.: I quite agree with the view which has just been expressed by my Brother Bramwell. I think that *Galliard* v. *Laxton* (1) was well decided, and is an authority which we ought to follow. Whenever a warrant has been issued to arrest a person charged with an offence in respect of which he cannot be apprehended without a warrant, the police officer must have the warrant in his possession at the time when he executes it; if he has not, the arrest will be illegal.

DENMAN, J.: The general rule is, that in felony a police constable may arrest without a warrant, that in offences of a lesser degree he cannot: it follows, therefore, that when a warrant has been issued for an offence punishable upon summary conviction, the officer executing it ought to have it in his possession, ready to be produced if it is asked for. In *Galliard* v. *Laxton* (1) the distinction was drawn between arrests for felony and arrests for other matters; and it is plain from that case that arrests for offences less than felony stand upon the same footing as arrests upon civil process. The case which I have mentioned was followed by *Hannen, J., in *Reg.* v. *Chapman* (2), and I can- [357
not doubt that it enunciates a correct principle. The respondent was not in the execution of his duty, and the information was not proved. The conviction must be quashed.

Judgment for the appellant.

Solicitors for appellant: *E. W. & R. C. Mote*, for Carter & Son, Torquay.

Solicitors for respondent: *Parkers*, for Hooper & Michelmore, Newton Abbott.

(1) 2 B. & S., 363; 31 L. J. (M.C.), 123. (2) 12 Cox, C. C., 4.

The English cases in regard to arrests without warrant are collected and elaborately reviewed by Mr. Greaves, the well known editor of Russell on Crimes, published in Cox & Saunders' Criminal Acts (3d ed.), LXI, entitled "The Law of Arrest without Warrants."

See also Price *v.* Seeley, 10 Clark & Finnelly, 28, 1 Bennett & Heard's Lead. Crim. Cas. (2d ed.), 177, and notes 183–193, 197–202, Id., 220 note; Burn's Justice, tit. "Arrest"; 1 Albany Law Jour., 28; Hurd on Habeas Corpus (1st ed.), 402, 395 (2d ed.); Moak's Van Sant. Pl., 331–2; 1 Bish. Crim. Proc. (2d ed.), §§ 164–173, 181–6; 3 Whart. Crim. Law (7th ed.), §§ 2927–2935; 1 Russell on Crimes (5th Eng. ed.), 709–730; Id. (7th Am. ed.), 255–9.

Questions as to the right to arrest without warrant arise in four classes of cases:

1. Where such arrests are made by a constable or other peace officer on a charge of felony.

2. Where such arrests are made by a private citizen.

3. Where such arrests are made by a constable or peace officer on a charge of misdemeanor.

4. Where such arrests are made by a private citizen.

1. Where an arrest is made by a *constable or other peace officer* on a charge of a past felony without a warrant, the general rule is that he has a right at common law, without a warrant, to arrest any one whom he suspects to be guilty of felony, whether he acts upon his own knowledge or upon facts communicated by others.

California: People *v.* Pool, 27 Cal., 572.

Canada (Upper): Rogers *v.* Van Valkenburgh, 20 Q. B., 218; Cottrell *v.* Hueston, 7 C. Pl., 277.

Connecticut: Knot *v.* Gray, Kirby, 67.

England: Gosden *v.* Elphick, 4 Exch., 445; 8 N. Y., Leg. Obs., 204.

Illinois: Shanley *v.* Wells, 71 Illinois, 78.

Indiana: Doering *v.* State, 49 Ind., 56, 19 Am. Rep., 669, 672 note.

Kentucky: Jamieson *v.* Garnett, 10 Bush, 221.

Maine: Burke *v.* Bell, 36 Maine, 317.

Massachusetts: Rohan *v.* Lawin, 5 Cush., 281; Com. *v.* Carey, 12 Cush., 246; Com. *v.* McLaughlin, Id., 615.

Michigan: Drennan *v.* People, 10 Mich., 169.

New York: Holley *v.* Mix, 3 Wend., 350; Matter of Henry, 29 How. Prac., 187; Slater *v.* Wood, 9 Bosw., 15, 26; Burns *v.* Erben, 40 N. Y., 463, affirming 1 Rob., 555, 26 How., 273; Wilson *v.* King, 39 N. Y. Superior Ct. R., 384; Carpenter *v.* Mills, 29 How. Pr., 473; Taylor *v.* Strong, 3 Wend., 483; Brown *v.* Chadsey, 39 Barb., 253; Butler *v.* Hawley, 54 Barb., 490, 48 Barb., 101.

Though he has a void warrant: Miller *v.* Foley, 28 Barb., 632, 2 Wait's Prac., 44.

Rhode Island: Wade *v.* Chaffee, 8 R. I., 224, 5 Am. Rep., 572, 574 note.

2. Where an arrest is made by a *constable or other peace officer* on a charge for a felony committed in his presence without a warrant, the general rule is that he may arrest any person so committing such offence.

Illinois: Miles *v.* Weston, 66 Ills., 361.

New York: Willis *v.* Warren, 17 How. Pr., 100.

3. Where an arrest is made by a *private citizen* without warrant, on a charge of a past felony, the general rule is that two things must concur which the party arresting must prove at his peril.

(*a*). A felony must have been committed by some person.

(*b*). Such private person must have had reasonable cause to believe the party arrested to be the guilty person.

Alabama: Morrell *v.* Quarles, 35 Ala., 544.

Canada (Upper): Rogers *v.* Van Valkenburgh, 20 Q. B., 220; McKenzie *v.* Gibson, 8 Q. B., 100; Ashley *v.* Dundas, 5 K. B., O.S., 749; Patterson *v.* Scott, 38 Q. B., 642.

Connecticut: Wrexford *v.* Smith, 2 Root, 171.

England: Lester *v.* Perryman, L. R., 4 H. L., 521, reversing L. R., 3 Exch., 197.

Georgia: Habersham *v.* State, 56 Geo., 61; Long *v.* State, 12 Geo., 292.

Illinois: Dodds *v.* Board, 43 Ills., 95; Marshall *v.* Smith, 49 Ills., 396; Smith *v.* Donnelly, 66 Ills., 464.

Indiana: See Doering *v.* State, 49 Ind., 56.

New Jersey: Renk *v.* McGregor, 32 N. J. Law, 70; Spencer *v.* Anness, 32 N. J. Law, 100.

See Schroeder *v.* Ehlers, 31 N. J. Law, 44.

New York: Holley *v.* Mix, 3 Wendell, 350; Burns *v.* Erben, 40 N. Y., 463; People *v.* Adler, 3 Park., 249; Brown *v.* Chadsey, 39 Barb., 253; Butler *v.* Hawley, 54 Barb., 490, 48 Barb., 101.

North Carolina: State *v.* Bryant, 65 N. C., 327.

Pennsylvania: Wakeley *v.* Hart, 6 Binn., 316.

4. Where an arrest is made by a private citizen without warrant, on a charge of a felony committed in his presence, the general rule is that all persons whatever, who are present when a felony is committed, are bound to apprehend the offender.

Georgia: Long *v.* State, 12 Ga., 293.

New York: Phillips *v.* Trull, 11 Johns., 487; People *v.* Wolven, 7 N. Y. Leg. Obs., 89.

Wisconsin: Keenan *v.* State, 8 Wisconsin, 132.

5. Where an arrest is made by a constable or other peace officer without a warrant, on a charge of past misdemeanor, the general rule is that he cannot at common law arrest for such an offence after it has been committed.

England: Regina *v.* Walker, Bell's C. C., 358; Price *v.* Seeley, 10 Clark & Finnelly, 28.

Georgia: See Johnson *v.* State, 30 Geo., 426.

Illinois: Rafferty *v.* People, 69 Ills., 111, 18 Amer. Rep., 601; Shanley *v.* Wells, 71 Ills., 78, 82; Main *v.* McCarty, 15 Ills., 441.

Ireland: Forbes *v.* Lloyd, Irish L. R., 10 C. L., 552.

Kansas: See Prell *v.* McDonald, 7 Kans., 426.

Massachusetts: Com. *v.* Carey, 12 Cush., 246; Com. *v.* McLaughlin, Id., 615.

New York: Phillips *v.* Trull, 11 Johns., 486; Meyer *v.* Clark, 41 N. Y. Superior Court Rep., 107; People *v.* Adler, 3 Park., 249

See Butler *v.* Hawley, 54 Barb., 490, 48 Barb., 101.

See Sands *v.* Benedict, 5 Thomp. & Cooke, 19.

North Carolina: State *v.* Belk, 76 N. C., 12.

Ohio: See under *statute:* Wolf *v.* State, 19 Ohio St. R., 248, 257.

6. Where an arrest is made by a constable or other peace officer without warrant, on a charge for a misdemeanor committed in his presence, or just terminated, involving a breach of the peace, the general rule is that he may arrest for a misdemeanor involving an affray or a breach of the peace continuing at the time of the arrest, or a well founded apprehension of its renewal: Price *v.* Seeley, 10 Clark & Fin., 28; Henessey *v.* Conolly, 6 N. Y. Weekly Dig., 83; although the cases are quite conflicting as to whether he may not arrest for any misdemeanor, whether it involve a breach of the peace or not, and the practitioner should examine the cases in his own state.

Connecticut: Knot *v.* Gray, 1 Root, 66.

England: Hanway *v.* Boultber, 1 Moody & Rob., 15; Regina *v.* Light, Dears. & B. C. C., 332; Timothy *v.* Simpson, 1 Cr., Mees. & Rosc., 757, and note, p. 765, Johnson & Co.'s ed.

Illinois: Newton *v.* Locklin, 77 Ills., 103; Shanley *v.* Wells, 71 Ills., 78; Lancaster *v.* Lane, 19 Ills., 242.

Indiana: Nealis *v.* Hayward, 48 Ind., 19.

Ireland: Murphy *v.* McClelland, Irish L. R., 5 C. L., 440.

Michigan: An insane person: Lott *v.* Sweet, 33 Mich., 308.

New York: Henessey *v.* Conolly, 6 N. Y. Weekly Dig., 83; Coyles *v.* Husten, 10 Johns., 85; Phillips *v.* Trull, 11 Johns., 486; Butolph *v.* Blust, 41 How. Pr., 481; Carpenter *v.* Mills, 29 How., 473; Stage Horse Cases, 15 Abb. Pr., N.S., 51, 61; Willis *v.* Warren, 17 How., 100; Meyer *v.* Clark, 41 N. Y. Superior Court Rep., 107, 113.

See Sands *v.* Benedict, 5 Thomp. & Cooke, 19.

North Carolina: State *v.* Belk, 76 N. C., 12.

Pennsylvania: Com. *v.* Fisher, 1 Leg. Gazette R., 50; Com. *v.* Deacon, 8 Serg. & Rawle, 47.

7. Where an arrest is made by a *private citizen* without warrant, on a charge of a past misdemeanor, the general rule is he has no right to do so.

Illinois: See Smith *v.* Donnelly, 66 Ills., 464.

Indiana: Doering *v.* State, 49 Indiana, 56.

Kentucky: Jamieson *v.* Garnett, 10 Bush, 221.

New York: People *v.* Adler, 3 Park., 249.

8. Where an arrest is made by a *private citizen without warrant*, on a charge of a misdemeanor committed in his presence, the general rule is that he cannot arrest for a misdemeanor without warrant, though a private person may arrest or give in charge one engaged in an affray or breach of the peace continuing at the time of the arrest, or if there be a well founded apprehension of its renewal: Price *v.* Seeley, 10 Clark & Finnelly, 28.

England: Price *v.* Seeley, 10 Clark & Finnelly, 28.

Minnesota: Judson *v.* Reardon, 16 Minn., 431.

New York: Phillips *v.* Trull, 11 Johns., 486.

Where a private citizen merely discloses what he knows and only expresses an opinion that there was enough of suspicion to have the accused examined, but does not request or urge any arrest but leaves it to an officer to decide on its propriety, he is not liable for an arrest made by an officer; Burns *v.* Erben, 26 How., 273, 277, 1 Rob., 555, affirmed 40 N. Y. 463; Patterson *v.* Scott, 38 U. C. Q. B., 644; Van Latham *v.* Libby, 38 Barb., 339; Peckham *v.* Tomlinson, 6 Barb., 253; Carratt *v.* Morley, 1 Q. B., 18; Barber *v.* Rollinson, 1 Cromp. & Mees., 330; West *v.* Smallwood, 3 Mees. & Welsb, 418; Brown *v.* Chapman, 6 C. B., 365; Cohen *v.* Morgan, 6 D. & R., 8; Cooper *v.* Harding, 7 Q. B., 928.

See also Farnam *v.* Feeley, 56 N.Y., 451.

Otherwise if he take any part in the arrest: Brown *v.* Chadsey, 39 Barb., 253; Patterson *v.* Scott, 38 U. C. Q. B., 644.

A private citizen when sued for false imprisonment in giving a party into custody under charge of a felony, may show reasonable and probable cause of suspicion in mitigation of damages: Perkins *v.* Vaughn, 4 Man. & Gr., 989; 1 N. Y. Leg. Obs., 285; Gosden *v.* Elphick, 4 Exch., 445, 447; 8 N. Y. Leg. Obs., 204; Brown *v.* Chadsey, 39 Barb., 253; Judson *v.* Reardon, 16 Minn., 431.

As to an officer taking and detaining gambling instruments and other articles to be used as evidence, see Willis *v.* Warren, 17 How. Pr., 100, 1 Hilton, 590; Spaulding *v.* Preston, 21 Vermont, 9, 1 Law Reporter, N.S., 453; Bolles *v.* State, 3 West Va., 685, 687; Houghton *v.* Bachman, 47 Barb., 388; Com. *v.* Gaming Implements, 119 Mass., 332; Closson *v.* Morrison, 47 N. H., 482.

As to arrests for violation of a city ordinance, see Schneider *v.* McLane, 36 Barb., 495, 4 Abb. Court App. Dec., 154, 3 Trans. App., 266, 3 Keyes, 568; Sircle *v.* Neeves, 47 Ind., 289; Shanley *v.* Wells, 71 Ills, 78; State *v.* Belk, 76 N. C., 10; Nealis *v.* Hayward, 48 Ind., 19; Johnson *v.* State, 30 Geo., 426; Bryan *v.* Bates, 15 Ills., 87; Main *v.* McCarty, 15 Ills., 441; Henessey *v.* Conolly, 6 Weekly Dig., 83, N. Y. Supreme Court.

Detaining for too long a time, or does not take the accused before a magistrate: Habersham *v.* State, 56 Geo., 61; State *v.* Parker, 75 N. C., 249, 23 Am. Rep., 669; Brock *v.* Stimson, 108 Mass., 520, 11 Am. Rep., 390; Johnson *v.* Mayor, 46 Geo., 80; Burke *v.* Bell, 36 Maine, 317; Judson *v.* Reardon, 16 Minn. 431; Butler *v.* Hawley, 48 Barb., 101.

A magistrate has no authority to order a person, accused of a criminal offence, to be committed until a subsequent day for examination, without the accused being first brought before him: Pratt *v.* Hill, 16 Barb., 303.

See Sircle *v.* Neeves, 47 Ind., 289.

As to the duty of an officer making arrest upon a telegram: Matter of Henry, 29 How., 185; Hawley *v.* Butler, 48 Barb., 101, 54 Barb., 490; Ex parte Cubreth, 49 Cal., 435.

[1 Exchequer Division, 357.]

June 20, 1876.

[IN THE COURT OF APPEAL.]

GADD v. HOUGHTON and Another.

Principal and Agent—Sale of Goods—Broker making Sold note "on Account of" foreign Principal—Personal Liability of Broker.

Fruit brokers in Liverpool gave a fruit merchant the following sold note: "We have this day sold to you on account of James Morand & Co., Valencia, 2,000 cases Valencia oranges, of the brand James Morand & Co., at 12*s.* 9*d.* per case free on board, ..." and signed it without any addition. The purchaser having brought an action against the brokers for non-delivery of the oranges:

Held, reversing the decision of the Exchequer Division, that the words "on account of James Morand & Co." showed an intention to make the foreign principals, and not the brokers, liable, and that the brokers were not liable upon the contract.

Paice v. *Walker* (Law Rep., 5 Ex., 173) commented on.

THIS was an action for non-delivery of oranges sold by the defendants to the plaintiff. At the trial before Pollock, B., at the Liverpool spring assizes, 1875, the following facts were proved: The plaintiff, a fruit merchant in Liverpool, having had some communication with the defendants, who were fruit brokers in Liverpool, as to the purchase of oranges with the brand of James Morand & Co., wrote to the defendants on the 4th of November, 1874, as follows: "Pleas telegraph out an order on my account for 2,000 cases Valencia oranges (all 420s) of the brand James Morand & Co. Shipment from commencement of season to not later than the 7th of December next, at 12*s.* 9*d.* per case, f. o. b." The *defendants accordingly telegraphed to James [358 Morand & Co. at Valencia, in Spain, that they had this offer, and having on the 7th of November received a reply by telegram from Morand & Co. that they accepted the offer, the defendants, on the 9th of November, wrote to the plaintiff as follows: "Mr. George Gadd. We have this day sold to you on account of James Morand & Co., Valencia, 2,000 cases Valencia oranges (all 420s) of the brand 'James Morand & Co.' at 12*s.* 9*d.* per case, free on board. Shipment from commencement of season, to not later than 7th of December next. Payment as usual. J. C. Houghton & Co." The contract not having been performed, the plaintiff brought this action. The defendants' counsel contended that upon this contract Morand & Co., and not the defendants, were liable, and they called several brokers and other witnesses, who gave evidence of usage in Liverpool as to the non-liability of brokers upon contracts in the present form, but

the evidence became immaterial in the view taken of the contract by the Court of Appeal. A verdict was then entered for the defendants, with leave to the plaintiff to move to enter it for him, on the ground that the defendants were personally liable on the contract, the damages, if necessary, to be settled by a referee.

An order *nisi* having been obtained accordingly, was, after argument on the 11th of January, 1876, made absolute by the Exchequer Division (Kelly, C.B., Pollock and Huddleston, BB.), on the ground that the case was undistinguishable from *Paice* v. *Walker* (1).

From this decision the defendants appealed.

Benjamin, Q.C., and *Bigham*, for the appellants, referred to *Cropper* v. *Cook* (2), *Paice* v. *Walker* (1), and to *Southwell* v. *Bowditch* (3). [The arguments as to the admissibility and effect of the evidence of usage are omitted as immaterial, the Court of Appeal holding that the defendants were not liable, without reference to that usage.]

Herschell, Q.C., and *M'Connell*, for the plaintiff: The defendants having signed the contract in their own name 359] without *qualification are *prima facie* liable personally: see the note to *Thomson* v. *Davenport* (4). It is not sufficient for an agent to state that he is agent: per Lord Campbell in *Parker* v. *Winlow* (5); the intention to bind the principal and not the agent should clearly appear from the agent's signature, as in *Deslandes* v. *Gregory* (6). When, as here, the principal is a foreigner, residing abroad, the presumption is, to say the least, stronger that it is intended to make the agent responsible: *Lennard* v. *Robinson* (7), and Story on Agency, 7th ed., ss. 268, 290, 400.

JAMES, L.J.: I think the judgment of the Exchequer Division ought to be reversed. The case is not, in my opinion, in any way governed by *Paice* v. *Walker* (1), for whatever the decision was in that case upon the words "as agents," the words in the present case, "on account of," are not at all ambiguous, and it would be impossible to make them words of description. The *ratio decidendi* in *Paice* v. *Walker* (1) was that, having regard to the contract and all the circumstances of the case, the words "as agents" must be considered as merely describing or intimating the fact that the defendants were agents, and did not amount to a statement that they were making a bargain "on account of" another person. Those are the very words used in the

(1) Law Rep., 5 Ex., 178.
(2) Law Rep., 3 C. P., 194.
(3) 1 C. P. D., 100, and on appeal, 374.
(4) 2 Sm. L. C., 6th ed., 344.
(5) 7 E. & B., at p. 947; 27 L. J. (Q.B.), at p. 52.
(6) 2 E. & E., 602; 29 L. J. (Q.B.), 93.
(7) 5 E. & B., 125; 24 L. J. (Q.B.), 275.

present case. When a man says that he is making a contract "on account of" some one else, it seems to me that he uses the very strongest terms the English language affords to show that he is not binding himself, but is binding his principal. As to *Paice* v. *Walker* (1), I cannot conceive that the words "as agents" can be properly understood as implying merely a description. The word "as" seems to exclude that idea. If that case were now before us, I should hold that the words "as agents" in that case had the same effect as the words "on account of" in the present case, and that the decision in that case ought not to stand. I do not dissent from the principle that a man does not relieve himself from liability upon a contract by using words which are intended to be merely words of description, *but [360 I do not think the words "as agents" were words of description.

MELLISH, L.J.: I am of the same opinion. The question is whether, on the true construction of this contract, Houghton & Co. sold the goods themselves or entered into a contract on behalf of Morand & Co. The language used must be interpreted according to its plain and natural meaning. As is said in the note to *Thomson* v. *Davenport* (2), when a man signs a contract in his own name he is *prima facie* a contracting party and liable, and there must be something very strong on the face of the instrument to show that the liability does not attach to him. But if there are plain words to show that he is contracting on behalf of somebody else, why are we not to give effect to them? I can see no difference between a man writing "I, A. B., as agent for C. D., have sold to you," and signing "A. B.;" and his writing, "I have sold to you" and signing "A. B. for C. D. the seller." When the signature comes at the end you apply it to everything which occurs throughout the contract. If all that appears is that the agent has been making a contract on behalf of some other person, it seems to me to follow of necessity that that other person is the person liable. This is one of the simplest possible cases. How can the words "on account of Morand & Co." be inserted merely as a description? The words mean that Morand & Co. are the people who have sold. It follows that the persons who have signed are merely the brokers and are not liable. I agree also that the circumstances of *Paice* v. *Walker* (1) are to be distinguished from the present, and that the judgment of the Exchequer Division ought to be reversed.

BAGGALLAY, J.A., concurred.

(1) Law Rep., 5 Ex., 173.

(2) 2 Sm. L. C., 6th ed., 344.

QUAIN, J.: The case appears to me plain. It seems extraordinary that there should be any doubt whether this binds the principal or the agent. It is said that in order to relieve the agent from liability, he must sign "as agent" or "on account of" Morand & Co. I cannot see the necessity for adding those words to the signature if you can gather from the contract that he makes it on account of Morand & 361] Co. Those words at the end of the *signature would add nothing to what has been stated in the body of the contract. The agent, therefore, does not render himself personally liable by not adding them.

ARCHIBALD, J.: I am of the same opinion. The usual way in which an agent contracts so as not to render himself personally liable is by signing as agent. That, however, is not the only way; because, if it is clear from the body of the contract that he contracted only as agent, he would save his liability. No words could be plainer than the words "on account of Morand & Co." to show that the defendants contracted only as agents.

I also agree that *Paice* v. *Walker* (1) is to be distinguished from this case.

Judgment reversed and rule discharged.

Solicitors for plaintiff: *Johnson & Weatherall*, for Snowball, Copeman & Smith, Liverpool.

Solicitor for defendants: *E. Byrne*, for Whitley & Maddock, Liverpool.

(1) Law Rep., 5 Ex., 173.

[1 Exchequer Division, 364.]

May 22, 1876.

364] *PICKARD v. MARRIAGE.

Bill of Sale—Possession or apparent Possession of Goods by Grantor as Servant to Grantee—Description of every attesting Witness—Affidavit Defective—17 & 18 Vict. c. 36, ss. 1, 5.

The execution by the grantor of a bill of sale which was not made under process and which required registration was attested by two witnesses, and contained a description of the residence and occupation of each witness. The affidavit filed with the bill contained a description of the residence and occupation of only one of the attesting witnesses:

Held, that the affidavit was not sufficient to satisfy 17 & 18 Vict. c. 36, s. 1, since it did not contain a description of the residence and occupation of "every attesting witness."

The grantor of a bill of sale of household furniture managed a business as servant to the grantee at a weekly salary, and was allowed to reside in the house where the business was carried on and to use the furniture as part of his salary, the grantee residing elsewhere. The goods having been taken in an execution against the grantor and the bill not having been duly registered:

Held, that the goods were in the possession of the grantor within the meaning of 17 & 18 Vict. c. 36, ss. 1, 5, and that the execution creditor was entitled to them as against the grantee.

INTERPLEADER issue, in which the plaintiff affirmed, and the defendant denied, that certain goods and chattels on the 11th of *February, 1875, seized that day by the [365 sheriff of Surrey, under a *fi. fa.* issued upon a judgment recovered by the defendant against Henry Pickard, were the property of Edwin Pickard, the plaintiff. At the trial at the Surrey spring assizes, 1875, before Joyce, Q.C., commissioner, the following facts were proved:

In October, 1874, the plaintiff Edwin Pickard, a dairyman and cab owner, bought a dairy business at Stockwell Green for his brother Henry, the debtor, who thereupon brought up from a farm which he had previously rented, his family and household furniture to the house at Stockwell Green, and began to reside there and carry on the dairy business. The debtor being unable to pay the purchase-money, the plaintiff completed the purchase on his own account, and paid the debtor 25*s.* a week as his manager. On the 3d of December the debtor, in consideration of past advances and a present loan, gave the plaintiff a bill of sale of all the furniture and goods on the premises at Stockwell Green. It was provided by the bill that so long as the plaintiff should think fit the debtor should "have the use and apparent possession of the household furniture, goods, &c." The bill also recited that the debtor had put the plaintiff "in full possession by delivering to him one chair in the name of all the household furniture, goods, &c." The chair, however, remained with the rest of the furniture on the premises, where the debtor continued to reside and appeared to be the owner of the business until the sheriff seized, the plaintiff residing elsewhere. There was some evidence to the effect that the plaintiff and the debtor had agreed that the debtor should have the use of the house and furniture as part of his wages as the plaintiff's manager. The debtor's execution of the bill was attested by two witnesses, one being "J. J. Jackson, 51 Thornton Street, Brixton, S.W., clerk;" and the other, "William Jackson, 51 Thornton Street, Brixton, Surrey, house and business agent." The bill was registered on the 4th of December, and with it was filed an affidavit by "William Jackson, of No. 51 Thornton Street, Brixton Road, in the county of Surrey, house and business agent," verifying the bill, but containing no reference whatever to the other attesting witness, J. J. Jackson.

The defendant's counsel contended that the goods were at

the time of the seizure by the sheriff in the possession, or
366] apparent *possession, of the debtor within the meaning of the Bills of Sale Act, 17 & 18 Vict. c. 36, and that the bill therefore required registration, and that the affidavit was defective. The jury found that the bill of sale was given *bona fide* for advances of money by the plaintiff to the debtor, and a verdict was entered for the plaintiff. An order *nisi* was afterwards obtained to enter the verdict for the defendant, pursuant to leave reserved, on the ground that the affidavit filed by the plaintiff in pursuance of 17 & 18 Vict. c. 36 was defective, in not containing a description of the residence and occupation of both the attesting witnesses to the bill of sale under which the plaintiff claimed.

1875. Nov. 4. *Edmund Thomas*, for the plaintiff, showed cause: The order ought to be discharged on two grounds; first, that the bill of sale did not require registration, and, secondly, that it was duly registered. First, it did not require registration because the goods were not "in the possession or apparent possession" of the grantor within the meaning of 17 & 18 Vict. c. 36. They were in the possession of the grantee by his servant, the grantor, who received a weekly salary, calculated on the basis that the servant enjoyed the use of the furniture. It was the same as if the debtor had paid rent for the furniture, and the rent had been deducted from his salary. Secondly, the affidavit was sufficient, as it contained a description of the residence and occupation of one of the attesting witnesses. The words of 17 & 18 Vict. c. 36, s. 1, "and of every attesting witness to such bill of sale," refer only to bills of sale "given by any person under or in execution of any process;" or if they apply to every bill of sale, then they are meant to meet the case where more than one grantor executes, and before different witnesses. Here the bill of sale gave the residence and occupation of both witnesses, and in *Routh* v. *Roublot* (1) Lord Campbell said: "I lay down no rule but this, that the affidavit required by the statute must give such information as reasonable persons would require." When there is an insufficient description of the grantor in the affidavit, the bill of sale may be referred to to supplement the affidavit: *Jones* v. *Harris* (2).

367] *W. *Willis*, for the defendant, in support of the order: First, the debtor had the same use of the furniture before as after the execution of the bill of sale. The house was "occupied" by him, and the goods were "used and

(1) 1 E. & E., 850, 852; 28 L. J. (Q.B.), 240. (2) Law Rep., 7 Q. B., 157.

enjoyed by him," and he was therefore in possession of them within the act. Secondly, the clause "and of every attesting witness to such bill of sale" is not confined to bills given under process: *Nicholson* v. *Cooper* (1).

[CLEASBY, B., referred to *Tutton* v. *Sanoner* (2) and 1 Ch. Arch. Pr., p. 670 (12th ed.), and the cases there cited.]

KELLY, C.B.: We think that the affidavit must contain a description of the residence and occupation of every attesting witness, and that it was therefore insufficient. On the other point, we will consider our judgment.

Cur. adv. vult.

May 22. The judgment of the court (Kelly, C.B., Bramwell and Cleasby, BB.) was delivered by

BRAMWELL, B.: We think the order must be made absolute. The first question was whether the affidavit was sufficient, the description of one of the attesting witnesses being omitted from the affidavit, and we are all of opinion, as was intimated during the argument, that, upon the decided authorities, the affidavit was not sufficient. But the principal question which arose was this: the plaintiff contended that the grantor was not in possession of the goods at the time of the seizure. We think he was in possession, the furniture being in the room occupied by the grantor as servant to the grantee, he using the room and having the benefit of the furniture as part of his wages. It was said that he was in possession only as servant, and therefore the case was not within the Bills of Sale Act. But we think it is within the very mischief the act was intended to prevent. If, instead of 25*s*. a week wages and the use of the furniture free, he had had 30*s*. a week and had paid rent for the furniture, it is manifest he would have been in possession. If we acceded to the plaintiff's argument, we should hold that the grantor of a bill of sale might contend that he had given up possession because he paid rent to the grantee, and that registration *was not required. This would bring about the [368 very mischief the act was intended to prevent. The rule must therefore be absolute to enter the verdict for the defendant, the bill not having been duly registered, because of the defect in the affidavit.

Order absolute.

Solicitor for plaintiff: *Edward Crammond.*
Solicitor for defendant: *O. March.*

(1) 27 L. J. (Ex.), 393.

(2) 3 H. & N., 280; 27 L. J. (Ex.), 293.

[1 Exchequer Division, 368.]

May 5, 1876.

BOBBETT v. PINKETT.

Banker and Customer—Payment of crossed Check to wrong Bankers—Forged Indorsement—Ratification by Customer of Banker's unauthorized Payment—Money had and received.

The plaintiff drew a check on his bankers, M. & Co., payable to order, crossed it "L. & C. Bank," and sent it for value to the payee, from whom it was stolen and his indorsement forged. It was ultimately passed to the defendant, who took it *bona fide* in ignorance of the forgery. The defendant gave it to his country bankers, and their London agents, the L. and J. Bank presented and received payment for it from M. & Co., who either did not perceive or disregarded the crossing "L. & C. Bank." On hearing it was paid the defendant gave value for it to a customer. Meanwhile the plaintiff, at the payee's request, had sent him a second check for the same amount, which was also paid by M. & Co., and the plaintiff's account was debited with both checks. The plaintiff having brought an action for the amount of the first check, for money had and received by the defendant, the jury found that all the parties concerned, except the defendant, namely, the plaintiff, M. & Co., and the payee, had been guilty of negligence with regard to the payment of the first check:

Held, that the first check had been paid by M. & Co. improperly and without authority, because they had paid it to the wrong bankers, and that the plaintiff could maintain this action against the defendant who had acquired no title to the check.

ACTION for £47 16*s.* 11*d.*, for money had and received and money due on accounts stated. Plea, never indebted, and issue thereon.

At the trial before Bramwell, B., in Middlesex, on the 21st of April, 1875, the following facts appeared: On the 14th of December, 1874, the plaintiff, a corn merchant at Tunbridge Wells, drew a check for £47 16*s.* 11*d.* on his Tunbridge Wells bankers, Molineux & Co., payable to the order of one
369] Pennack, crossed the *check "London & County Bank," and sent it by post to Pennack, his creditor, at Birmingham, who left it lying about. Some one stole it, and forged Pennack's indorsement. A few days after, the check, purporting to be indorsed by Pennack, was handed to the defendant, the proprietor of an hotel in Worcester, by a customer, who asked the defendant to pay him the balance after deducting the amount of his hotel bill. The defendant, through his bankers, telegraphed to Molineux & Co., to know if the check was all right and would be paid. Molineux & Co. replied by telegram that the check was good, and would be paid unless they had orders not to pay it. The defendant then, acting *bona fide* and in ignorance of the forgery and the theft, took the check from his customer, and gave it to his own bankers, "The Worcester City and County Banking Co." for presentation. In the mean-

time, Pennack had, about the 15th of December, sent a letter, and a telegram to the plaintiff informing him of the loss of the check; but the plaintiff swore that he did not receive either letter or telegram, and did not know of the loss till late on the 29th of December, when he admitted he received a letter from Pennack mentioning the loss, requesting another check, and offering an indemnity in respect of the first check. The plaintiff accordingly, on the 29th, sent Pennack another check for the same amount. On the 30th of December, about 11 a.m.; the first check was presented to Molineux & Co. by the London and Joint Stock Bank as agents of the Worcester City and County Banking Co. Molineux & Co. (not observing or disregarding the name of the London and County Bank, which their manager said was nearly illegible) paid the check in the usual way to the London and Joint Stock Bank and debited the plaintiff's account with it (1). On the 1st of January, 1875, the second check was presented to Molineux & Co., paid, and debited by them to the plaintiff's account. The plaintiff admitted that he lived within a few minutes' walk from Molineux & Co.'s bank, but that he did not take any steps towards stopping the first check or communicating with them till the 4th of January, when he discovered that his *account had been debited with [370 both checks. On the 1st of January, the defendant, hearing that the first check had been paid, sent his customer the balance after deducting the amount of the hotel bill.

Bramwell, B., directed the jury to consider whether Pennack, the plaintiff, Molineux & Co., and the defendant, or any of them, were guilty of negligence, viz., Pennack in losing the check and in not taking further steps to stop it when he received no answer to his letter and telegram of the 15th of December; the plaintiff, in not stopping the first check on the evening of the 29th, or morning of the 30th, of December; Molineux & Co., in disregarding the name of the London and County Bank, which was in their own customer's handwriting; and the defendant in giving value for the check in the way he did. The jury found that all the above persons, except the defendant, were guilty of negligence. Bramwell, B., then directed a verdict for the defendant, giving leave to the plaintiff to move to enter it for him for £47 16*s.* 11*d.*, neither party to appeal from the Court of Exchequer. An order *nisi* was accordingly obtained, on the ground that upon the facts proved at the trial, together

(1) The check when produced in court bore the stamp of the London and Joint Stock Bank across it, but there was no evidence as to whether it was stamped before or after presentation to Molineux & Co.

with the findings of the jury, the plaintiff was entitled to a verdict.

Jan. 11, Feb. 14, 1876. *Powell*, Q.C., and *Jelf*, for the defendant, showed cause: The action for money had and received depends upon privity of contract, but the money received by the defendant was not the property of the plaintiff, but of Molineux & Co., and paid by them in their own wrong. The effect of 19 & 20 Vict. c. 25, s. 1, and 21 & 22 Vict. c. 79, ss. 1, 4, is that payment of a crossed check to the wrong banker is a void payment: Byles on Bills, 11th ed., p. 23. The plaintiff could undoubtedly treat it as such, and require his bankers to credit him with the amount, and he cannot treat it as a good payment, at least not so as to affect the defendant injuriously. The plaintiff is in this dilemma,—if the payment was bad, he must look to his bankers for indemnity; if it was good, he cannot recover it from the defendant. He cannot say it was both good and bad, or that his bankers were his agents and at the same time not his agents to pay. By not objecting to being 371] debited with the amount, he has *admitted the payment to be good, and is estopped from saying it is bad. The action for money had and received lies only when it is inequitable that the defendant should retain the money, but the defendant has done nothing wrong, and is the only person in the transaction not guilty of negligence. He took more than ordinary care. The plaintiff is injured not by the defendant's act, but by the laches of his bankers, and his own laches in not stopping the check the moment he heard of its loss, which he had ample time and means of doing. *Ogden* v. *Benas* (1) is no authority against the defendant, for there the plaintiff had committed no laches, and moreover could not sue his bankers, who were protected by 16 & 17 Vict. c. 59, s. 19, from the consequence of paying on a forged indorsement. But no statute protects bankers against payment of a crossed check to the wrong banker. The plaintiff, having a right against his own bankers to treat the payment as void, with full knowledge of the facts treats it as a good payment and does not put himself in the position of the plaintiff in *Wilkinson* v. *Johnson* (2). There being no privity between the plaintiff and defendant, the case is concluded by *Rogers* v. *Kelly* (3), per Lord Ellenborough. If the defendant is liable to any one, it is to Molineux & Co. *Smith* v. *Union Bank* (4), if it touches the present case at all, is an argument to show that the pay-

(1) Law Rep., 9 C. P., 513.
(2) 3 B. & C., 428.
(3) 2 Campb., 123.
(4) 1 Q. B. D., 31.

ment to the wrong bankers is a good payment, and cannot be upset.

W. Willis for the plaintiff: *Ogden* v. *Benas* (1) would be conclusive in the plaintiff's favor but for the distinction that there the check was not specially crossed, and was not paid to the wrong banker. This difference is unfavorable to the defendant; he ought not to have taken a specially crossed check at all; having obtained payment through the wrong banker, he cannot profit by his own wrongful act, or by the wrongful act of Molineux & Co. done at the defendant's request. *Rogers* v. *Kelly* (2) is irrelevant; there the banker was not the plaintiff's agent. The general principle is clear, that when a banker pays a check on a forged indorsement he can recover the money on the ground that the consideration failed, or that the instrument is not genuine, or that it was paid under a mistake of fact—Byles on Bills, p. 334, 11th ed., *citing *Jones* v. *Ryde* (3), and other cases. [372 See also *Cocks* v. *Masterman* (4) and *Smith* v. *Mercer* (5) to the same effect. Then if the banker, who is the customer's agent, can recover it, the customer can. The payment by Molineux & Co. was at first wholly unauthorized (21 & 22 Vict. c. 79, s. 1); but the principal may ratify an unauthorized act, and take the benefit of it, e.g., in the case of a distress for rent. The statutory restriction on crossed checks was imposed for the benefit of the customer, who may waive the benefit if he likes. It is conceded that the plaintiff had a reasonable time and opportunity to stop the check being paid, but he was under no obligation to do so as regards the defendant, about whom he knew nothing. He is not in the position of the plaintiff in *Young* v. *Grote* (6), or of those who actually do something which induces another to act to his own loss, and are estopped. Negligence to operate as an estoppel must be the proximate cause of the loss: *Swan* v. *North British Australasian Co.* (7).

Cur. adv. vult.

May 5. The following judgments were read:

BRAMWELL, B.: It is quite certain that if the payee had brought an action against the present defendant for the conversion of the check in question, he could have maintained it. It is also certain that the present plaintiff might have refused to allow the bankers, Molineux & Co., to debit his account with the amount of the check, and had he done so,

(1) Law Rep., 9 C. P., 513.
(2) 2 Campb., 123.
(3) 5 Taunt., 488.
(4) 9 B. & C., 902.
(5) 6 Taunt., 76.
(6) 4 Bing., 253.
(7) 7 H. & N., 603; 31 L. J. (Ex.), 425.

and had Molineux & Co. brought an action against the defendant to recover back the money they had paid him, they could have maintained that action. But, for some unintelligible reason, it has been thought right to bring the present action in the plaintiff's name, and so create a difficulty of party and procedure rather than of right. It is certain, however, that the defendant is liable in some way to some one, the question being whether he is liable in this action to this plaintiff.

When a banker pays a check, the customer may treat it as a payment made by himself, so as to recover the money back in certain cases, as for example when there is a failure 373] of consideration *between the drawer and payee of the check. But the difficulty suggested in this case is that the plaintiff cannot say that the payment was by his authority, so as to make it a payment by him, and yet that it was not with his authority, so as to enable him to recover it back—that he cannot approbate and reprobate. We think, however, that notwithstanding this objection, the plaintiff is entitled to recover.

There were two defects or difficulties in the defendant's title to the check and power to enforce payment of it. One, that the indorsement was forged. That was a defect in his title. Had this been all, it is clear that the bankers paying it would have been entitled to debit the plaintiff's account with it, and that he the plaintiff would have been entitled to get the money back from the defendant, treating its payment as with his authority, and therefore by him.

The other difficulty in the defendant's way was, that the check had across it the name of the London and County Bank, so that the defendant could only effectually present it through that bank. And if, as was the case, it was presented through another, the drawees might have refused to pay it, and if they did pay, the plaintiff might have refused to recognize that payment. But this is a matter between him and the defendants and the drawees, three persons; and the plaintiff may, it he thinks fit, say, "I was and am content that, if you were entitled to the check, it should have been presented by and paid to a person other than the banker whose name was crossed, and was and am content that I should be charged with it, if there was no defect in your title to it. But I say that, having discovered that you the defendant have no title to the check, and that a fourth person has, whose rights I cannot affect, I claim the money back from you on that ground." This is in effect what the plaintiff says. It is not to approbate and reprobate the same matter.

The plaintiff approbates the mode of presentment, but reprobates the defendant's title.

Another way of putting the case is this. The defendant cannot be heard to say that the check was improperly presented, for he presented it by his agents. Then the only other matter is one against him, viz., that he was not the lawful holder of the check. The truth is, it would be somewhat hard on the plaintiff if he *could not recover. [374 He has allowed his account to be debited with this check, and could not now object to it. The bankers, the drawees, could now maintain no action against the defendant. The payee, indeed, could, but that would be no indemnity to the plaintiff. On the other hand, this decision is no hardship to the defendant, who is clearly liable to some one; except, indeed, that it is very hard on him that he should be liable at all, being the only one of the various parties free from blame.

My Brother Cleasby agrees with this judgment, and also with that of my Brother Amphlett.

AMPHLETT, B.: It is clear that the defendant, although the innocent holder for value of the check with a forged indorsement of the payee's name, had no property in it, and was not entitled to recover the amount for which it was drawn. In ignorance, however, of the fraud, the check was presented for payment by London bankers on behalf of the defendant, and the drawees not observing or disregarding the fact that the bankers who presented it were not the same as those who were named in the crossing, and having sufficient assets of the plaintiff in their hands, paid the same and debited the amount in the plaintiff's account. The bankers by whom the check was presented afterwards accounted for the money they received to the defendant. Under these circumstances the defendant would be liable, beyond question, to be sued by somebody for the money thus wrongfully obtained; and leaving out of consideration for the moment the effect of the crossing, it may, I think, be considered as settled, both on principle and authority, that not only the drawees, but the plaintiff, whose money in fact it was, might maintain the action: see *Ogden* v. *Benas* (1).

The question, however, remains, whether the payment by the drawees to bankers other than those named in the crossing makes any difference. It cannot be denied that the crossing operated as a mandate to the drawees to pay the check to the bankers named and to no one else, and

(1) Law Rep., 9 C. P., 513.

that consequently the plaintiff might, if he was so minded, have declined to allow his account to be debited with the amount so paid contrary to his orders, and it was argued 375] *before us that his voluntarily submitting as he did to have his account so debited could not enable him to maintain an action against the defendant in his own name. It is not likely that any advantage would accrue to the defendant by a decision of this point in his favor, because another action might be immediately commenced by the drawees, and the fact that they, as between themselves and the plaintiff, had been indemnified against loss would not, I apprehend, be an answer to the action. Still, as conceivably the defendant's position might be altered by allowing the plaintiff to sue instead of the drawees, he has a right to have our judgment upon the point. After some hesitation, I have come to the conclusion that the plaintiff may sue in his own name, notwithstanding he had an option, which he declined to exercise, of disavowing the payment of the check, and throwing the loss, if any, upon the drawees.

It may be conceded that in an ordinary case, as the law stood at the time of this transaction, a right of action could not be transferred to his principal by an agent acting beyond the scope of his authority; but here it must be observed that the drawees were at least professing to act as the plaintiff's agents in paying the check, and the defendant himself applied to them for payment in that character; and the defendant therefore cannot, in my judgment, be allowed to set up a want of authority in the drawees which the plaintiff himself has declined to insist upon. Suppose B., professing to act as A.'s agent, but in fact not authorized, enters into a contract with C. Would not A., by subsequently ratifying B.'s act, be entitled to sue C. on the contract in his own name? See the judgment of Holroyd, J., in *Saunderson* v. *Griffiths* (1). Upon the whole I think our judgment ought to be for the plaintiff.

Order absolute to enter the verdict for the plaintiff for the amount of the check.

Solicitors for plaintiff: *Collyer-Bristow & Co.*, for Stone & Simpson, Tunbridge Wells.

Solicitors for defendant: *Hunt & Son*, for Rea & Miller, Worcester.

(1) 5 B. & C., 915.

See *ante*, p. 215 note.

[1 Exchequer Division, 395.]

May 5, 1876.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

*SHEFFIELD, Appellant; THE BOARD OF WORKS FOR THE FULHAM DISTRICT, Respondents. [395

Sewer—Street—New Street—Apportionment—Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *ss.* 52, 53, 112.

25 & 26 Vict. c. 102, s. 52, enacts: "Where any sewer shall . . . . be constructed by any . . . . district board in or for the drainage of any new street . . . . the expense . . . . shall be . . . . defrayed by the owners of such street . . . . and of the land bounding or abutting" thereon. Sect. 53 enacts: "Where any sewer shall be constructed by any . . . . district board in a street in which previously to such constructian there had been no sewer, or only an open sewer, but where sewers rates have been levied previously to such construction, the expense . . . , shall be . . . . defrayed in part only by the owners of the houses situate in and of the land bounding and abutting on such street respectively . . . . and the residue of such expenses shall be defrayed by the . . . . district board out of sewers rates levied in their . . . . district." By s. 112 "new street" includes streets to be formed after the 7th of August, 1862. The appellant was the owner of a piece of land within the respondents' district, upon which streets had been laid out since the 7th of August, 1862; certain building land not belonging to him bounded and abutted upon the ends of all the streets except one, which terminated at a cemetery. The respondents laid down sewers in the streets and apportioned the whole of the cost between the appellant, his tenants, and the owners of the cemetery. Sewer rates had for many years been levied in respect of the houses upon the appellant's land, although no sewer had previously existed in the streets thereon:

Held, that the word "street" in s. 53 included "new streets" as defined by s. 112, as well as old streets, that s. 52 did not apply, and, therefore, that the apportionment was invalid, as it did not provide that a portion of the cost of the sewers should be defrayed by the respondents out of the sewers rate levied in their district:

Semble, that even if s. 52 had been applicable, the apportionment would have been invalid, since it did not charge any portion of the cost of the sewers upon the owners of the building land bounding and abutting upon the ends of the streets.

CASE stated by a metropolitan police magistrate, under 20 & 21 Vict. c. 43.

The appellant was the owner in fee of a piece of land; along it ran a street called Field Road, terminating at one end at a cemetery, and at the other in Greyhound Road. Eight streets, named respectively, John Street, Francis Street, Dawson Street, Chelmsford Street, Suffolk Street, Norfolk Street, Hatfield Street, and Milton Street, ran out of Field Road on either side thereof, at right angles to it. All these streets were upon the appellant's *land, [396 and had been formed and laid out since the 7th of August, 1862. The land bounding and abutting upon the appellant's piece of land, and upon the ends of the eight streets before

mentioned did not belong to him; it was building land, and the eight streets were not prolonged beyond the appellant's land. The cemetery did not belong to him. Field Road and the eight streets before mentioned not being sewered to the satisfaction of the respondents, they resolved that, "the said streets be sewered under the provisions of 18 & 19 Vict. c. 120 and 25 & 26 Vict. c. 102." The expenses of the construction of the sewers, and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewers at the intersection of streets, and other incidental charges, were apportioned by the respondents, and the amount charged against the appellant came to £420. A part of the expenses of the construction of the sewers was apportioned upon the owners of the cemetery, but the whole of the rest of the expenses was apportioned upon the appellant or his tenants, and no part thereof was apportioned upon the owners of the building land bounding or abutting upon the ends of the said eight streets. Sewers rates had been levied, for many years previously to the passing of the resolution for the construction of the sewers, on the appellant as owner of the houses situate in the streets respectively, and on the owners of the land bounding and abutting on such streets, and abutting on the ends thereof, although there was no sewer in such streets: no portion of the said expenses and costs was proposed by the apportionment to be defrayed by the respondents. A plan of the sewers intended to be constructed in accordance with the resolution had been submitted to and sanctioned by the Metropolitan Board of Works.

The appellant having been summoned for non-payment of the amounts apportioned upon him, the foregoing facts were proved at the hearing.

It was contended for the appellant that he was not liable to pay the amounts, first, because no portion of the expense was apportioned to each of the owners of the land bounding or abutting on the ends of the streets; secondly, because, notwithstanding sewers rates had been levied in respect of the appellant's houses and land previously to the passing of
397] the resolution for the construction *of the sewers, yet the whole, and not a part only, of the expenses and costs was apportioned to be borne and defrayed by the appellant, his tenants, and the owners of the cemetery.

The magistrate ordered payment by the appellant of the amounts charged upon him.

The question for the opinion of this court was, whether

the appellant was liable to be ordered to pay the said amounts (1).

April 28, 29; May 5. *R. V. Williams* (*J. O. Griffits*, Q.C., with him) for the appellant: It is submitted that the apportionment is wrong, and cannot be sustained under either s. 52 or s. 53 of the Metropolis Management Amendment Act, 1862 (2), for no part of the cost of constructing the sewers is to be defrayed either by the owners of the building land bounding and abutting upon the ends of the streets under s. 52, or by the respondents under s. 53.

*[DENMAN, J.: Ought not the appellant to have [398 appealed against the apportionment to the Metropolitan Board of Works under 25 & 26 Vict. c. 102, s. 57?]

It is submitted that he need not, because the respondents had no jurisdiction to make the apportionment: *Whitchurch* v. *Fulham Board of Works* (3). No doubt the discretion exercised by them in fixing the amounts to be contributed under apportionments lawfully made cannot be questioned in this court: *Nesbitt* v. *Greenwich Board of*

(1) Other objections were urged before the magistrate on behalf of the appellant, but owing to the view taken by the court it is unnecessary to mention them.

(2) By the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 21, "It shall be lawful for the said Metropolitan Board, and they are hereby authorized and empowered, during the construction of any works by them under the recited acts or this act, subject to the provisions of such acts, to cause to be stopped up all or such part of the carriage or footway of any streets, roads, or ways as shall be necessary for the due execution of the said works."

Sect. 52: "Where any sewer shall, after the passing of this act, be constructed by any vestry or district board in or for the drainage of any new street, or of any house or houses erected since the 1st day of January, 1856, the expense of constructing such sewer and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewer at the intersection of streets, and other incidental charges and expenses, shall be borne and defrayed by the owners of such street or houses, and of the land bounding or abutting on such street respectively, and the said expenses shall be apportioned by the vestry or district board in such proportions as they may deem just."

Sect. 53: "Where any sewer shall be constructed by any vestry or district board in a street in which previously to such construction there had been no sewer, or only an open sewer, but where sewers rates have been levied previously to such construction, the expense of constructing such sewer and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewer at the intersection of streets, and other incidental charges and expenses, shall be borne and defrayed in part only by the owners of the houses situate in and of the land bounding and abutting on such street respectively; and the amount to be borne by such owners shall be determined by the vestry or district board in each particular case, and the residue of such expenses shall be defrayed by the vestry or district board out of the sewers rates levied in their parish or district."

Sect. 112: "The expression 'new street' shall apply to and include all streets hereafter to be formed or laid out," that is, after the 7th of August, 1862.

(3) Law Rep., 1 Q. B., 233.

Works (1); *London and North Western Ry. Co.* v. *Vestry of St. Pancras* (2): but here the respondents have exceeded their powers, and have thrown the whole expense of constructing the sewers upon the appellant, his tenants, and the owners of the cemetery.

Biron, for the respondents: The apportionment has been made under s. 52; for, as all the streets upon the appellant's land were "new streets" within the Metropolis Management Acts, the respondents could not proceed under s. 53, which applies only to old streets.

[BRAMWELL, B.: Why does not the word "street" in s. 53 comprehend "new streets" as well as old? If it does, the respondents ought to have made the apportionment under it, and not under s. 52; for in the present case all the other incidents of s. 53 are fulfilled.]

It seems to follow from *Dryden* v. *Overseers of Putney* (3), that in the Metropolis Management Acts "street" does not include "new streets" as therein defined; but if s. 53 is applicable to the present case, it must be admitted that the apportionment is based upon a wrong principle.

R. V. Williams did not reply.

BRAMWELL, B.: I am of opinion that the appellant is entitled to our judgment. Previously to the construction of the sewers by the respondents there was no sewer in the appellant's land, but sewers rates had been paid in respect of his houses; therefore some portion of the expense incurred by the respondents in constructing the sewers ought to be borne by them, pursuant to the provisions of s. 53. It
399] has been, however, contended before us by *the respondents' counsel that the apportionment is valid, and that s. 53 does not apply; and it has been argued that the word "street" is to be taken to mean exclusively old streets, and does not include "new streets" as defined by 25 & 26 Vict. c. 102. It would seem to follow from this contention that wherever the word "street" occurs in the Metropolitan Management Acts it must be taken as comprehending only old streets; but it is manifest that this cannot be its true interpretation. The 21st section of 25 & 26 Vict. c. 102, which gives power to stop up streets during the execution of works, must apply to "new streets" as well as old, although the word "street" alone is used therein; and I think that in s. 53 it must receive the wider interpretation. The order of the magistrate must be quashed.

DENMAN, J.: I am of the same opinion. After the argument which we have heard, I think it clear that s. 53 applies

(1) Law Rep., 10 Q. B., 465. (2) 17 L. T. (N.S.), 654. (3) *Ante*, p. 223.

to this case, and that the apportionment is bad because it throws the whole expense of constructing the sewers upon the appellant and his tenants as owners of the houses, and upon the owners of the cemetery, without apportioning any part thereof upon the respondents' district.

I may mention that, even under s. 52 the apportionment seems to me to be bad, for no portion of the cost of constructing the sewers is imposed upon the owners of the land bounding and abutting upon the ends of the eight streets referred to in the case. I do not, however, express any definite opinion as to this, as it is not a matter necessary to our decision.

BRAMWELL, B.: I concur in my Brother Denman's remarks as to whether the apportionment could be sustained under s. 52.

Judgment for the appellant (1).

Solicitors for appellant: *Sheffield & Sons.*
Solicitors for respondents: *Watson, Sons & Room.*

(1) But see *Sawyer* v. *Vestry of Paddington*, Law Rep., 6 Q. B., 164, where Blackburn and Lush, JJ., dissenting from *Vestry of St. Giles, Camberwell* v. *Weller*, Law Rep., 6 Q. B., 168 (n.), held that 25 & 26 Vict. c. 102, s. 53, applies only to old streets.

[1 Exchequer Division, 400.]

May 18, 1876.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

*THE BOARD OF WORKS FOR THE FULHAM DISTRICT, Appellants; GOODWIN, Respondent. [400

Sewer—New Street—Metropolis Management Amendment Act, 1862 (25 & 26 *Vict.* c. 102), ss. 44, 52, 112.

The respondent, within the limits of the Metropolis Management Acts, and with the sanction of the Metropolitan Board of Works, constructed a sewer for the drainage of the M. road, in which he owned certain houses, and which was a "new street" within the meaning of the above mentioned acts. Afterwards the appellants took up the sewer constructed by the respondent, and in place thereof laid down another for the drainage of the neighborhood:

Held, that the respondent was not liable to pay any portion of the cost of the sewer laid down by the appellants.

CASE stated by a metropolitan police magistrate, under 20 & 21 Vict. c. 43.

Complaint was made by the appellants of the non-payment by the respondent of the sum of £646, as owner of certain premises situate and being in Mayland Road, in respect of certain sewer works, Mayland Road having been formed and laid out as a new street since the 7th of August, 1862, and a summons having been issued, the following facts were proved at the hearing:

The respondent had been, in 1867, and still was the owner of certain houses in Mayland Road, and the tenants thereof had, previously to the making of the new sewer, paid sewers rates; he was not the owner of any house or land in Coningham Road, which was a continuation of Mayland Road. On or about the 1st of February, 1867, the Metropolitan Board of Works sanctioned the construction of a sewer in the centre of Mayland Road by the owners, under s. 44 of 25 & 26 Vict. c. 102. Such sewer was built, and drainage works were made at the expense of the respondent, according to plans submitted to and approved by the Metropolitan Board of Works, and extended the entire length of the Mayland Road, about 1,050 ft. The construction of a sewer in Coningham Road by the owners, with an outfall into the Uxbridge Road, was sanctioned by the Metropolitan Board of Works, and constructed in two sections: the first section 401] was in accordance *with such sanction; the second section, about 500 ft. in length, was not in accordance with such sanction, its outfall being into the sewer of Mayland Road, instead of into the Uxbridge Road. In April, 1875, the Board of Works for the Fulham district determined to have the sewers before mentioned taken up and reconstructed. The provisions of the several acts relating to sewers in force in 1867 were complied with by the respondent in the construction of the sewer in the year 1867. In the month of June, 1875, the district board caused the sewers to be removed, and constructed a brick main sewer throughout the whole of Mayland Road, and a lage part of Coningham Road, with man-holes and gullies sufficient to take the sewage of a large and populous neighborhood; and they connected the drainage of the houses in Mayland Road, and of the several houses in Coningham Road, with the new sewer. The costs and expenses of the works executed in 1875 amounted to the sum of £2,527, and the appellants apportioned the same upon the owners of the houses and land in Mayland and Coningham Roads.

Upon the hearing of the summons, it was contended on the part of the respondent, first, that the apportionment whereby the respondent was sought to be charged, and which amounted to the sum of £646, was bad in law, because the appellants, having removed the old sewer in Mayland Road, sanctioned and made as before stated, were bound to substitute one as efficient, but not at the cost of the owners; secondly, that the sewer, in respect of which the present claim was made against the respondent, was a sewer for taking the sewage of the whole neighborhood, in-

cluding the side streets, and not of the Mayland Road and Coningham Road only, and that therefore the owners of houses in Mayland Road ought not to pay the costs; thirdly, that any sewer replacing an old one vested in the district board ought to be made at the cost of the rate payers.

The magistrate dismissed the summons.

The question for the opinion of this court was, whether the respondent was liable to pay the said sum of £646 in respect of the said apportionment.

If this courts should be of opinion that he was so liable, judgment was to be entered for the appellants; but if it should be of *opinion that he was not so liable, judg- [402
ment was to be entered for the respondent.

H. T. Boddam, for the appellants: The magistrate was wrong in dismissing the summons. The appellants were empowered by the Metropolis Management Amendment Act, 1862, s. 52 (1), to lay down a sewer at the expense of the respondent. Mayland Road was plainly a "new street," within the meaning of the interpretation clause (s. 112), for it has been formed and laid out since the passing of that statute; and whenever a sewer is constructed in a new street by a district board, the expense of the work must be borne by the neighboring owners, under s. 52: *Sawyer* v. *Vestry of Paddington* (2).

John Day, Q.C. (*T. R. Kemp* with him), for the respon-

(1) By the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 44, "It shall be lawful for the owners or occupiers of any land or premises in any parish, district, or part, within the limits of the metropolis . . . . with the consent and subject to the regulations and conditions hereinafter mentioned, to construct sewers at their own expense for the purpose of draining such land or premises; and it shall be lawful for any vestry or district board in whom the sewers in any parish, district, or part are vested, if they shall deem it just and proper so to do, to contribute out of the rates under their control, applicable to the execution of works of sewerage, to the cost of any sewers constructed for the purpose aforesaid."

By s. 47, every person intending to make a sewer shall first obtain the sanction of the vestry or district board.

By s. 48, no vestry or district board shall sanction the construction of any such sewer, without the approval of the Metropolitan Board of Works.

By s. 52, "Where any sewer shall, after the passing of this act, be constructed by any vestry or district board, in or for the drainage of any new street, or of any house or houses erected since the 1st of January, 1856, the expense of constructing such sewer, and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewer at the intersection of streets, and other incidental charges and expenses, shall be borne and defrayed by the owners of such street or houses, and of the land bounding or abutting on such street respectively, and the said expenses shall be apportioned by the vestry or district board in such proportions as they may deem just."

By s. 112, "The expression, 'new street' shall apply to and include all streets hereafter to be formed or laid out," that is, after the 7th of August, 1862.

(2) Law Rep., 6 Q. B., 164.

dent: The decision of the magistrate was right. As Mayland Road had already been sewered by the respondent at his own expense, he could not be called upon under s. 52 to 403] pay the costs of a fresh *sewer laid down by the appellants. The sewer constructed by the respondent vested in the appellants under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 68, and they were bound to repair it, and if necessary to replace it, under s. 69. [He was then stopped.]

CLEASBY, B.: I do not feel much difficulty in coming to the conclusion that this appeal must be dismissed, on the ground that the facts proved do not render the respondent liable to pay the expenses incurred by the appellants in constructing the sewer in 1875. The sewer laid down by the respondent in 1867 was constructed by him under the Metropolis Management Amendment Act, 1862, s. 44, and pursuant to the Metropolis Management Act, 1855, s. 68, it vested in the appellants; he did all that was necessary in the matter, but in 1875 the appellants caused this sewer to be removed and laid down another. Under these circumstances, it appears to me scarcely arguable that the appellants can call upon the owners of the houses in Mayland Road to pay for the cost of the new sewer. It seems to me unreasonable to hold that after the neighboring owners have constructed a sufficient sewer in a street, they can afterwards be called upon to contribute to the cost of a fresh sewer. I also think that the appellants could not, under the circumstances, charge the respondent with the cost of the drainage of the whole neighborhood.

GROVE, J.: I am of the same opinion. It seems to me to be the policy of the enactments cited before us to throw in the first instance the cost of constructing sewers in a new street upon the neighboring owners, but when the street has once been sufficiently sewered, to impose upon the vestry or district board the duty of maintaining and replacing the original sewers out of the funds at their disposal.

FIELD, J., concurred.

Judgment for the respondent.

Solicitors for appellants: *Watson, Sons & Room.*
Solicitor for respondent: *W. A. Downing.*

[1 Exchequer Division, 419.]

June 1, 1876.

[IN THE COURT OF APPEAL FROM INFERIOR COURTS.]

*SMITH, Appellant; BARNHAM, Respondent. [419

Nuisance—Watercourse "belonging" to River—Artificial Stream—"Wilfully."

14 Geo. 3, c. 96, which was passed for improving the navigation of certain rivers, enacted that "if any person or persons shall wilfully throw any soil . . . . into any part of the said rivers . . . . or of any drains, trenches, or watercourses thereunto belonging, every such person shall for every such offence forfeit" a sum of money.

The appellant was a tanner, having premises on a small natural stream at a point about four miles from one of the rivers, into which it flowed at a place where that river was navigable: in the course of his business he discharged refuse from his works into the natural stream: he was convicted by a stipendiary magistrate of an offence against the foregoing enactment:

Held, that the words "drains, trenches, or watercourses thereunto belonging" applied only to artificial streams made for the purpose of improving the navigation of the rivers, and did not apply to natural streams, and therefore that the conviction was wrong.

Held, also (per Bramwell, B.), that inasmuch as the appellant discharged the refuse in the course of his business, he did not "wilfully" throw it into the stream within the meaning of the statute.

CASE stated by a stipendiary police magistrate for the borough of Leeds, under 20 & 21 Vict. c. 43.

At a petty sessions holden on the 3d of March, 1876, an information under s. 97 of 14 Geo. 3, c. 96 (1) was heard, charging *that the appellant on the 8th of January [420

(1) 14 Geo. 3, c. 96, is intituled "An act to amend an act passed in the tenth and eleventh years of the reign of King William the Third, intituled 'An act for the making and keeping navigable the rivers of Aire and Calder in the county of York;' and for improving the navigation of the said river Aire from Weeland to the river Ouze; and for making a navigable canal from the said river Aire, at or near Haddlesey, to the river Ouze, at the Old Brick Garth at Ouze Gate End, within the township of Selby, in the said county; and for other purposes:" it enacts by

Sect. 97. "If any person or persons shall wilfully throw any soil, earth, ballast, gravel, stones, roots, bushes, or other rubbish, into any part of the said rivers, cuts, or canal, or of any drains, trenches, or watercourses thereunto belonging, every such person shall, for every such offence, forfeit any sum not exceeding five pounds nor less than forty shillings, at the discretion of the justice or justices of the peace before whom the offender shall be convicted."

Sect. 103. "All the penalties, fines, and forfeitures hereby inflicted, or authorized to be imposed (the manner of levying and recovery whereof is not otherwise hereby particularly directed), shall, upon proof of the offences respectively, before any justice of the peace for the place wherein the offence shall be committed, or the offender shall be or reside . . . . be levied by distress and sale of the goods and chattels of the party or parties offending . . . . and the moneys arising from such penalties, forfeitures, and fines, when levied, shall be (if not otherwise directed to be applied by this act) paid, one moiety to the party or parties injured, and the other moiety to the informer."

Sect. 111. after reciting that "the legal estate and interest in the present

in the year aforesaid wilfully and unlawfully did throw a quantity of soil, earth, and rubbish into a beck there situate, called Sheepscar Beck, the said beck being a watercourse belonging to the river Aire in the borough of Leeds.

At the hearing it was proved that the real complainants were undertakers of the Aire and Calder navigation, upon whom statutory powers were conferred by 10 & 11 Wm. 3, c. 19, 14 Geo. 3, c. 96, 1 Geo. 4, c. 39, and 9 Geo. 4, c. 98. The appellant was a tanner, having premises on the Sheepscar Beck (a beck averaging in its course about five feet in width and eighteen inches in depth at the middle of the stream), at a point about four miles from the river Aire, into which it flowed at a place, where that river was navigable and formed part of the navigation authorized by the statute first above referred to. The beck was and had for many years been used by the occupiers of several tanneries and manufactories on its banks. The beck ran under the appellant's premises in a large culvert, through the wall of which thirty-three pipes of about five inches' diameter projected over the stream; and there were also two drains about two feet square from the appellant's premises into the beck. On the day in question the business was being carried on, and out of a five inch pipe water charged with lime and earthy matter was discharged into the beck, and a sieve having been put under the mouth of the pipe was allowed to remain for about three quarters of an hour, during which 421] time it received and retained about half *a pound of lime and earthy matter, which would otherwise have been passed into the beck; and out of the drain two feet square, water was discharged with earthy and fleshy matter, which during the same time left a residue in a basket of about half a peck in measure of such earthy and fleshy matter, which would otherwise have passed into the beck. The appellant had carried on the same business of a tanner in the same manner at the same premises for less than twenty years.

On the part of the appellant, it was contended that the statute did not apply to the case of a manufacturer who, in the course of his business, turned mere refuse matter from his works held in suspension in water into the beck; that the beck was not such a watercourse as was mentioned in s. 97; that the lime and earthy and fleshy matter dis-

navigation of the said rivers, with the works and appurtenances of navigation thereunto belonging, and the tolls and duties by the said former act granted, and divers messuages, mills, warehouses, buildings, lands, tenements, and hereditaments," were vested in certain persons, contains provisions for vesting the lands to be purchased under 14 Geo. 3, c. 96, and other provisions of a similar nature.

charged into the beck were neither soil, earth, nor rubbish within the meaning of that section, and that they were not wilfully thrown in within its meaning.

It appeared to the magistrate that the object of s. 97 was to keep the rivers mentioned in the acts and their tributaries free from obstructions, which might be caused by the throwing of soil, earth, or rubbish into them, and that it could make no difference whether such soil, &c., was thrown into them by using the hand or machinery or water as the motive power, or whether it was so thrown out of mere wantonness or for the purpose of getting rid of soil, &c., which having served the purpose of a manufacturer was no longer useful to him. It further appeared to the magistrate that the lime and earthy and fleshy matter discharged into the beck by the appellant were soil, earth, or rubbish. Whether Sheepscar Beck was a watercourse belonging to the Aire within the meaning of s. 97, was a question upon which he entertained some doubt, but he was of opinion that it was such a watercourse. He therefore convicted the appellant, and ordered him to pay a penalty of sixty shillings and the costs.

The question of law arising on the foregoing case was, whether the magistrate was right in convicting the appellant on the aforesaid grounds.

Manisty, Q.C. (*John Forbes* with him), for the appellant: It is *submitted that Sheepscar Beck cannot be called [422 a "watercourse belonging" to the river Aire at the point where the refuse from the appellant's works flows into it: 14 Geo. 3, c. 96, s. 97, was intended merely to prevent such pollution of the rivers Aire and Calder as might obstruct the navigation thereof. Now the refuse from the appellant's works being discharged at the distance of four miles could not possibly hinder the navigation; moreover the act merely comprehends artificial watercourses, and Sheepscar Beck is a natural stream. It is further contended that the refuse is not wilfully thrown into the beck within the meaning of the statute: "wilfully" there means "wantonly," or "unnecessarily," whilst the appellant, who carries on a useful trade, discharges refuse into the stream because it is the most convenient mode of getting rid of it.

Shield, for the respondant: The construction suggested on the appellant's behalf would reduce the enactment almost to a nullity, and the clause, being of a remedial nature, ought to receive a liberal interpretation, so as to carry into effect what may be presumed to have been the intention of the Legislature, namely, the preservation of the navigable waters from pollution.

BRAMWELL, B.: I am of opinion that this conviction ought to be quashed. It is always difficult to construe an enactment so comprehensive in its language as the clause upon which the appellant has been convicted; but I think it clear that he is entitled to our judgment. The penalty is imposed upon a person throwing soil, earth, or rubbish into the rivers, cuts, or canal, or the "drains, trenches, or watercourses thereunto belonging:" now Sheepscar Beck is a tributary of the Aire, and is a natural stream; and for the reasons which I will proceed to give, it does not seem to me to be a "watercourse belonging" to that river in the sense in which that expression is used by the Legislature. I think that the words "drains, trenches, or watercourses thereunto belonging" were intended to comprise only those watercourses which are made by the hand of man and artificially connected with the navigation, and, in fact, form a portion of it. Further, it seems to me that s. 103, which 423] gives one moiety of the penalty *when levied "to the party or parties injured," throws light upon the meaning of s. 97, and shows that it is intended only to apply to such acts as are injurious to the undertakers of the navigation. The words "to the injury of the undertakers" are not found in s. 97; but it must be injurious to them to throw into the rivers or canal any of the forbidden things, for they all have a tendency to obstruct the free passage of the water and also of boats passing along it; but it cannot be injurious to the undertakers to discharge refuse from a tannery into a natural stream, which afterwards has to flow four miles before it joins one of the rivers. Moreover, the words "soil, earth, ballast, gravel, stones, roots, bushes," primarily apply to what has been dug or taken out of the ground in order to execute the works necessary to improve the navigation, and they seem to show that it was merely intended to forbid the throwing back of things which are of the same nature as those which have been removed, and which, when thrown in, must necessarily be injurious to the undertakers by filling up wholly or in part some portion of the navigable stream. The word "rubbish," if it stood alone, might cause a doubt; but in any point of view the words of the clause must be limited, for otherwise throwing in rubbish near the source of the rivers far beyond the limits of the navigation would be an offence punishable under this enactment, and this, we must assume, cannot have been the intention of the Legislature. I, therefore, think that as Sheepscar Beck was a natural stream, and as no injury was caused to the undertakers, the appellant was not liable for discharging refuse

into it; in my opinion, a person throwing soil, earth, or rubbish into a natural stream flowing into one of the rivers, but at a point beyond the limits of the navigation, is not liable to be convicted under s. 97; but I express no opinion, whether the undertakers may not obtain redress by other remedies against a person who pollutes a watercourse beyond the limits of the navigation, whereby they sustain an injury.

Further, I think that the refuse was not "wilfully" thrown in within the meaning of the clause: for it was discharged in the course of carrying on a lawful trade, and, as it appears, in the exercise of a supposed right; "wilfully" appearse to me in this *section to mean "wantonly" [424 or "causelessly." I, therefore, think that the appellant is entitled to judgment.

I may remark that, in my opinion, if an act is committed contrary to the prohibition of this clause, it is immaterial that it has been done in the same manner and to the same extent for a period of more than twenty years; the person committing it will nevertheless be liable to be convicted.

GROVE, J.: I also think that the conviction ought to be quashed; but I base my judgment simply upon the ground that Sheepscar Beck is not a "watercourse belonging" to the river Aire. I think that the section was intended to protect only those streams which are ancillary to the navigation; and upon the facts before us the beck is a tributary and natural stream, and the refuse from the appellant's works flows in at a point far beyond where the navigation begins. Sect. 111 of 14 Geo. 3, c. 96, speaks of "the legal estate and interest in the present navigation of the said rivers, with the works and appurtenances of navigation thereunto belonging:" here the word "belonging" is plainly applied to something artificial, and I think it must be understood in the same sense in s. 97. The construction contended for on behalf of the respondent seems to me extravagant, and contrary to the intention of the Legislature.

Judgment for the appellaut.

Solicitors for appellant: *Torr, Janeway, Tagart & Co.*, for Simpson & Burrell, Leeds.

Solicitors for respondent: *Evans, Forster & Rutter*, for Newstead & Wilson, Leeds.

See 9 Eng. R., 726 note; Higgins on Pollution of Watercourses.

A riparian owner has no right, in the absence of express grant or prescription, to pollute the waters of a stream, and make it unfit for drinking purposes: Dwight, etc., *v.* Boston, 12 Mass., 583; Merrifield *v.* Lombard, 13 Allen, 16.

A person throwing noxious matter

into Lake Ontario, or any other public navigable water, is liable both to an indictment for committing a public nuisance, and to a private action at the suit of any individual *distinctly* and *peculiarly* injured.

The right which an individual has to the use of public navigable water in its pure and natural state, is not founded upon the possession of land or of a mill or house adjoining the water, but simply upon the same common law right which every other individual has, to use the water in its unadulterated state, whether he possesses land, mills or houses on its banks or not: Watson *v.* Toronto Gas, etc., 4 Upper Can. Q. B., 158, overruling Hubert *v.* Groves, 1 Esp. N. P., 148, and distinguishing Rex *v.* Directors, etc., of Bristol Dock Co., 12 East, 429, and citing Rose *v.* Miles, 4 Maule & Selw., 101, anonymous note to Hammond *v.* Pearson, 1 Camp., 517, Wilkes *v.* Hungerford etc., 2 Bing. N. C., 281, Carter *v.* Canthrope, 4 Mod., 153. Higgins on Pollution of Watercourses, 67–74, 119, 247.

Where the owners of adjoining lands have dug a canal through their lands to the sea, and each of them has, by agreement between them, a right of way through the canal for vessels, a city, which is authorized to lay out common sewers, and has constructed a sewer emptying into the canal, without taking therefor the land of said owners, has no right to discharge the sewage into the canal in such a manner as to impede navigation or to create a nuisance, and the owner of any one of said parcels of land, who has been injured by the illegal act of the city, may have relief in equity.

A city built a sewer in 1851, emptying into a private canal. The discharge from the sewer increased continuously with the growth of that part of the city drained by it, but the deposits caused by the sewer in the canal did not impair to any great extent the navigation of the canal or create a nuisance until about five years prior to 1874, in which year a bill in equity to abate the nuisance was filed against the city by an owner of land bordering on the canal, who had a right to navigate the same with vessels. Held that the defendant had no right by prescription to continue the nuisance. Held, also, that in the absence of evidence that the defendant had been prejudiced by the delay in bringing the suit, the plaintiff was not guilty of laches.

Where the owner of a canal is injured, by the unlawful discharge by a city of its sewage into the canal, and applies for an injunction to restrain such discharge, regard will be had, in determining the nature of the relief to be granted, to the injury which the public will sustain by a strict enforcement of the owner's rights, and the court will be influenced, in settling the terms of the final decree, by all proper suggestions in this regard; Boston, etc., *v.* Cambridge, 117 Mass., 396.

[1 Exchequer Division, 484.]

June 19, 1876.

[IN THE COURT OF APPEAL.]

484] *LEWIS v. CARR.

Alderman or Councillor of a Borough—Interest in a Contract with Council—Disqualification during Continuance of Contract—Penalties for acting—Municipal Corporations Act (5 & 6 *Wm.* 4, *c.* 76), *ss.* 28, 52, 53.

The disqualification, under s. 28 of 5 & 6 Wm. 4, c. 76, of any person who has any interest in a contract with the council of the borough, to be elected or be an alderman or councillor of the borough, applies only during the continuance of the contract. So that by becoming interested in such a contract an alderman or councillor does not cease to be qualified or become disqualified within the meaning of s. 53, so as to incur penalties for acting after the termination of the contract.

THIS was an action brought by a burgess of the borough of Macclesfield to recover five penalties of £50 each from the

defendant for acting as an alderman for that borough. The declaration alleged that before and at the time of so acting the defendant had become disqualified to hold the office of alderman of the borough by having a share and interest in certain contracts for the supply of goods by the defendant to the council of the borough.

At the trial before Lord Coleridge, C.J., at Chester, at the summer assizes, 1875, it appeared that the defendant was a tallow chandler in the borough of Macclesfield, which is a *borough within sched. A, of the Muncipal Corpora- [485 tions Act (5 & 6 Wm. 4, c. 76), and that in the year 1874, while holding the office of alderman of the borough, he had sold goods on several occasions to the corporation on orders drawn up by the waterworks committee of the council, and approved by the council, and sent by them to the defendant's place of business. Payment was made at intervals by orders signed by three members of the council and countersigned by the town clerk. In May, 1875, the defendant acted on five several occasions as alderman, and these were the offences for which the penalties were sought to be recovered. At that time all the goods that had been supplied by the defendant to the council had been paid for, and there were no outstanding transactions between them. On these facts the learned judge held that any supply of goods to the council was within the 28th section of 5 & 6 Wm. 4, c. 76 (1),

(1) By 5 & 6 Wm. 4, c. 76, s. 28, "Nor shall any person be qualified to be elected or to be a councillor of any such borough or an alderman of any such borough . . . . during such time as he shall have directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of such council."

By s. 52, "If any person holding the office of mayor, alderman, or councillor for any borough shall be declared bankrupt, or shall apply to take the benefit of any act for the relief of insolvent debtors, or shall compound by deed with his creditors, or being mayor shall be absent for more than two calendar months, or being an alderman or councillor for more than six months at one and the same time (unless in case of illness) from the borough of which he shall be mayor, alderman, or councillor, then and in every such case such person shall thereupon immediately become disqualified, and shall cease to hold the office of such mayor, alderman, or councillor as aforesaid . . . : and the council thereupon shall forthwith declare the said office to be void, and shall signify the same by notice in writing under the hands of three of more of them, countersigned by the town clerk, to be affixed in some public place within the borough, and the said office shall thereupon become void . . . ."

By s. 58, "If any person shall act as mayor, alderman, or councillor, or auditor, or assessor for any borough, without having made the declaration hereinbefore required in that behalf, or without being duly qualified at the time of making such declaration, or after he shall cease to be qualified according to the provisions of this act, or after he shall have become disqualified to hold any such office, he shall for every such offence forfeit the sum of £50, such sum to be recovered, with full costs of suit, by any person who will sue for the same within three calendar months after the commission of such offence, by action of debt or on the case in any of his Majesty's superior courts of record, &c."

486] and disqualfied the defendant *from being an alderman, and subjected him to penalties for subsequently acting. He accordingly directed a verdict for the plaintiff for £250. A rule *nisi* was afterward obtained for a new trial, on the ground of misdirection.

Feb. 24, 1876. *Arthur Williams* (Sir *H. Giffard*, S.G., with him) showed cause: The transactions were contracts, and the disqualification having once arisen must be continuous. The case is within the mischief which the act was intended to remedy. The limitation of time in s. 28 is not applicable to a person who is already in office, and that section was intended to be read as applying a temporary disqualification from being elected during the continuance of an interest in the contract, but as absolutely taking away the qualification in the case of any person who is already an alderman. If the defendant was disqualified from being an alderman under s. 28, he has incurred the penalties under s. 53 by acting afterwards, unless he resigns or in some way ceases to hold the office and is re-elected. [He referred to *Nicholson* v. *Fields* (1).]

McIntyre, Q.C., and *Coxon*, in support of the rule: All the words of the 28th section must have effect given to them, and the disqualification to be an alderman, as well as that to be elected, must be during the time there is an interest in the contract. Otherwise a sale over the counter of any small amount would be a contract which would have the effect of a permanent disqualification. The statute is aimed at continuing contracts. Where there is an intention to avoid the office, it is clearly expressed as in the 52d section. In s. 53 there must be some limit of time, for a person who has lost a qualification is not barred thereby for all time from being an alderman or councillor if he becomes properly qualified and is re-elected. That section must, therefore, be read as applying to acts done after and during disqualification, and the defendant has, therefore, incurred no penalty. [They referred to *Reg.* v. *Francis* (2).]

BRAMWELL, B.: I think this rule should be made absolute. I think the plaintiff did not prove his case. Whether 487] the Legislature *intended that such contracts should or should not be within the act is another matter, but I think if a shilling's worth of stationery were bought of an alderman there would be a contract between the corporation and that alderman. Probably if they had intended it they would have used the word "dealing," or some such word. However, it is a contract, and, independently of any reasoning

(1) 7 H. & N., 810; 21 L. J. (Ex.), 233. (2) 18 Q. B., 526.

upon the matter, I think it is concluded by the case of *Nicholson* v. *Fields* (1), where a somewhat similar contract was involved. There it was a bill for lime supplied to certain commissioners. In this case it is a casual supply of candles, or some such thing. The question, then, is, whether the defendant's acts have brought him within the 53d section of the act. I do not like—and it is generally useless—referring to pleadings, but where it is necessary that the case be logically stated, either under the old system or under the more modern form of pleading, one cannot help getting some assistance by looking at the mode in which it has been put by the pleader; and I think if we look at the declaration in this case it will be found that the plaintiff has not proved his case. The declaration says that the borough of Macclesfield is a corporation within the Municipal Corporation Act; that the defendant claims to be an alderman of the borough, and that before and at the time of the committing of the grievance he had become disqualified to hold the office of alderman of the borough. That has certainly not been proved, because Mr. Williams concedes that if he had put himself up for election as an alderman at the time the declaration is speaking of, he would have been undoubtedly qualified to hold the office. It is true that he could not have put himself up at that time, because he was already in office, and perhaps could not be removed except by a *quo warranto;* but still, if in some way or other he had got out of office he would not have been, as the declaration says, "disqualified to hold the office of alderman." Then it goes on to say this, "To wit, by having a share and interest in certain contracts within the borough." Now I construe that to mean—and it is obviously the plain meaning—that at the time he committed the offence he had "an interest in a contract." If it had meant "having had," it should have said so, but it does not do so. This *pleading, to my [488 mind, correctly states the offence under the statute, but it satisfies me that the plaintiff has no case. Now, instead of dealing with the declaration, I will deal with the substance of the matter. It is alleged that this defendant, by what he has done, has brought himself within the 53d section of this act of Parliament.

Before considering the 53d section it will be as well to call attention to the 52d section, which states that if any person holding the office shall be declared a bankrupt, or any of the other things there mentioned shall happen, he shall "immediately become disqualified, and shall cease to

(1) 7 H. & N., 810; 21 L. J. (Ex.), 233.

hold the office." The 53d section says that if any person shall act as alderman without being duly qualified at the time of making the declaration, or after he shall cease to be qualified according to the provisions of the act, or after he shall have become disqualified, he is to forfeit for every such offence the sum of £50. Now the defendant had not become disqualified, because that means disqualified as previously stated, and that he had certainly not become; therefore the question is, whether he had "ceased to be qualified according to the provisions of this act." In order to ascertain whether he had ceased to be qualified, we are referred to the 28th section of the act, under which it is argued that he had ceased to be qualified. Now, let us look at the 28th section and see what it says. It says that, "No person shall be qualified to be elected"—leaving out for the moment the words "or to be"—"during such time as he shall have any interest" in a contract of this sort. If that was all, of course that would not do, because he had no interest at the time he was elected; but there are the further words "or to be;" and Mr. Williams says the meaning is that he shall not be elected if at the time of his seeking election he is interested in a contract, or if after election he becomes interested in a contract, he shall not continue "to be" an alderman of the borough. Then Mr. Williams had some little difficulty to contend with the word "during," but I think he was not averse to adopt this mode of dealing with it, that is, either to say that sense must be made of it in some way or other which is not for him to point out, or at all events, if the word "during" is to continue in, that then we are to take it with this consequence—that, inas-
489] much as he cannot be an alderman *during the time he shall have ceased to be *de jure* an alderman, and shall be liable to be turned out upon a *quo warranto*, and as he does not come into a lawful aldermanic condition, that is to say, he does not resume his aldermanic status lawfully on ceasing to be interested in a contract, the section must be read thus: He shall not be elected if he is interested at the time of the election, and if he becomes interested afterwards he shall cease to be an alderman *de jure*. Now I am not at all sure that that ingenious argument is well founded. I am not at all sure that the meaning is not that the law-maker supposes that it is not enough to say that he shall not be elected, because it might be said, "they ought not to elect him, but they have done so." I think that might be an argument, although, perhaps, a bad one, but still it is not unfrequently guarded against by this sort of expression—"he

shall not be elected, or if elected, he shall not be." I am not sure that the Legislature had any further meaning in the words they use in that section than that; but supposing we were to put upon it the meaning which Mr. Williams says we ought, and were to read it thus: "that he shall not be elected if at the time of his election he is engaged in a contract, or if, after election, having become interested in a contract he shall cease to be;" is that within the 53d section of the act of Parliament? The 53d section says that if he shall act without being duly qualified a certain thing shall happen; but if Mr. Williams' argument were stretched to the utmost, it does not follow that the defendant has acted without being duly qualified: the argument, in fact, proves not that he is disqualified, but that he is not an alderman. Now if the statute had said that he shall not act, not being an alderman, then it might have been that Mr. Williams' argument might have gone a long way to prove that he was not *de jure* an alderman; but the 53d section says "without being qualified." Now he is qualified, because it is conceded, and indeed it is clear, that if by any chance he got out of office he could immediately offer himself for re-election. It is impossible for me to read those words as suggested, because this consequence would follow, that if there was an informality in the election which would subject the man to be turned out upon a *quo warranto*, he would be subject to penalties during all the time he acted. I do not know that there *is any provision in the act of Parlia- [490
ment against that, and if not, and we hold that this extended to a man who is acting, and is not *de jure* an alderman, there is nothing to prevent him being subject to penalties. It seems that, giving the utmost weight to Mr. Williams' argument, s. 28 only shows this gentleman is not *de jure* an alderman, and that s. 53 imposes no penalty upon a man who is acting *de facto* as an alderman, but is not one *de jure*, but imposes a penalty where he is not duly qualified; and that is not the case with this defendant.

There is another argument which has incidentally arisen, which seems to me to be very strong to show that that must be the meaning of the statute. Mr. Williams did not tell us what would be the consequences of s. 28 being interpreted as he said it ought to be, whether the office was *ipso facto* void, or whether it could be made void upon a *quo warranto;* but he comes to the conclusion now, as I understand him, that it is not *ipso facto* void, but that it is void upon a *quo warranto*. Now observe the consequence: the *quo warranto* must be moved for within a year. Suppose it is

not moved for within a year, then the man is an alderman, and *de jure* an alderman, and he cannot be turned out, and yet he cannot act without being subject to penalties. That seems to be an inconsistency, and it seems to demonstrate that Mr. Williams' contention cannot be maintained.

But then we are met with an argument that we must deal with the words of those sections strictly, and that we ought to put the construction upon them for which the plaintiff contends in this case, because the consequence of not doing so would be very disastrous. I do not agree with that; I am by no means clear, as I said before, that the Legislature intended to deal with such a case as this in this way. I think that what they had in their minds, very likely, was one of those continuing contracts, that is to say, a contract for the supply of coal for a year, or a contract to do a large piece of building, or something of that kind where a man may make a large profit if he has got friendly persons to contract with him; and I doubt very much whether the Legislature intended these words to comprehend the case where there was a trifling dealing over the counter, and where the price paid for the articles was well known. It
491] has been suggested that if this were to be allowed *you would have one alderman, who is a stationer, on one day giving an alderman, who is a coal merchant, an order on different terms to what he would a member of the public, to supply coals, and that then the coals would be supplied and paid for, and thereupon the alderman who is the coal merchant would do the same good turn to the stationer; I doubt very much whether that sort of thing was intended to be provided against, or that it was apprehended as likely to take place. I think that, looking at the whole of the provision, the prohibition is against acting during the contract, and I think that was the mischief which the Legislature intended to guard against, and that they were content that after the contract was over he should act, knowing that under those circumstances it would prohibit the making of long contracts, because of the disqualification penalty in the case of an alderman acting, and they not caring much about prohibiting a short contract of this kind. I really do not feel pressed by the difficulty as to the policy of the act, and upon the words of it I think there was no case to go to the jury, and consequently that this rule must be made absolute for a new trial.

CLEASBY, B.: I have come to the same conclusion, feeling to some extent that the case is within the mischief pointed at by the act, but in this penal clause of the statute,

feeling bound to give a somewhat strict interpretation to the language. I do not feel myself much doubt that this contract is not only within the mischief contemplated by the act, but that it comes within the terms of it. The only assistance which I can obtain towards construing the act is from the terms of the subsequent statute, 15 Vict. c. 5, which explains this act and amends it. That act has this clause in it: "That from and after the passing of this act no person shall be deemed to have had or to have an interest in a contract or employment, with, by, or on behalf of such council, commissioners, or trustees, by reason only of his having had or having a share or interest in any newspaper in which any advertisement relating to the affairs of any such borough, council, commissioners, or trustees, may have been or may hereafter be inserted," which shows that the previous statute applies to simple acts of that sort, and not merely to permanent contracts. That being so the *question [492 which we have to deal with arises on the 53d section, which imposes a penalty if he shall act after he has become disqualified to hold office. The words are "after he shall have become disqualified," but that must be read to mean "after he shall have become disqualified and while he is disqualified." Now it is conceded that although he may be disqualified it is not a permanent disqualification, but that he might be re-elected, and might then be entitled to act. We must, therefore, necessarily read the 53d section as making the penalty attach to acting while the disqualification exists. I have not the least doubt that the office would continue full, indeed this is pretty plain on a comparison with the 52d section, the language of which is much stronger, and distinctly points out that in the cases there mentioned the office is void, and what steps are to be taken thereupon. Then we come to the difficulty in the construction of the 28th section. I do not feel myself justified in giving any different effect to the word "during" with reference to cases which have gone before it, and as I am obliged in reference to the first part of the sentence, respecting the disqualification to be elected, to limit that disqualification to the time during which there is an interest in the contract, I do not conceive, without some stronger reason than has been given, that I should be justified in giving to the same words applied to different and distinct cases "to be elected" "or to be" a different meaning. I feel bound, therefore, to hold that the disqualification to be an alderman was limited to the time during which there was an interest in the contracts, and that it is not made out that the acting took place under

the circumstances of the disqualification mentioned in the section.

AMPHLETT, B.: I am of the same opinion. Looking at the words of the 28th section, they seem to me as they stand to be very sensible. They require no violent interpretation at all to give them a sensible effect, for what the section says is this, "That no person shall be qualified to be elected or to be an alderman during the time he shall have any interest in a contract," that is, if he is interested in a contract at the time of the election, he shall not be qualified to be elected, and if he afterwards should become interested, he shall not be qualified to be an alderman dur-
493] ing such *time as he shall be so interested in the contract; he is not qualified *de jure* to act or be an alderman, and, therefore, might be removed by a *quo warranto*. That gives a plain and intelligible meaning to the words, and I do not see why we are to travel out of those words in order to give a more extensive effect to the clause than it would otherwise have, and I am very much confirmed in this opinion by seeing that in the same clause, that is, clause 28, it is said, and in almost the same words, "That no person shall be qualified to be elected or to be a councillor unless he shall have a certain property qualification," which is specified. Well, then, it would be said by Mr. Williams, and, in fact, consistently with his argument it could not be otherwise said, that if he had a property qualification according to the clause at the time of his election, but afterwards for a single moment, ceased to have that qualification, although he never acted during the time he had no real property qualification and subsequently re-acquired a property qualification, nevertheless he would be subject to penalties for afterwards acting, and that the only way of getting rid of his disqualification would be by re-election, although the mischief of the statute did not at all point to the necessity of his re-election. All the statute requires with regard to property qualification is, that when he acts as alderman he shall have a certain property qualification. It is very difficult, therefore, to say that if a person has ceased to hold a proper qualification by reason of some circumstance which has happened after his election, and has subsequently acquired a qualification, that still he would be liable to penalties, that is, that he has ceased *de jure* permanently to be an alderman. I cannot help thinking that it is very analogous to the case of a justice of the peace. What I find enacted by the statute 18 Geo. 2, c. 20, is, that from and after a certain date there specified no per-

son shall be capable of being a justice of the peace, or of acting as such, for any county unless he has a property qualification, and the penalty of £100 is there given to any person who will sue for it. The words are, "Any person who shall act as a justice of the peace without taking the oath," and so on, "or without being qualified according to the true intent and meaning of the act, shall for every such offence forfeit £100." It has been argued that although the act says that, "No person shall be a justice *of the [494 peace unless qualified," yet if he has ceased to have the qualification which he formerly possessed, he still remains a justice of the peace, and his acts are not void, but he is liable to the penalty; but although there are no cases cited on the subject, I find that Burns in his Justice of the Peace lays it down that if a justice of the peace has become disqualified and afterwards obtains a proper qualification, that then he may act without having a new commission, that is to say, he may act as a justice of the peace without being subject to the penalties (1). That seems to be strongly analogous to the case now before us. I will only add that the 52d section supports the view we have taken, because there it is enacted that when a person holding the office of alderman becomes bankrupt, or goes away for six months, not that he shall be disqualified from being elected or from being an alderman, but that his office shall cease, that there shall be a vacancy in his office, and provision is made for filling up that vacancy, while in the 28th and 53d sections the language is different, and it is admitted that there is no actual vacancy in the office. Therefore, in my opinion, this case does not come within the words of the section, and this rule ought to be made absolute.

Rule absolute.

From this judgment the plaintiff appealed.

June 19, 1876. *J. Brown*, Q.C., and *A. Williams* argued for the plaintiff, and *McIntyre*, Q.C., and *Coxon*, for the defendant, in support of the judgment of the Exchequer Division.

JAMES, L.J.: I am of opinion that the judgment ought to be affirmed. It is conceded that, in the words of sect. 53, something must be implied or understood, as there must be some limitation in point of time; for the mere fact of a disqualification having once attached would not prevent a person from being elected or re-elected, when the disqualification was removed, and acting without incurring penalties.

(1) Title, Justice of the Peace, sect. 4.

When we turn to the 28th section there is no sufficient reason for applying only to the election the limitation of the disqualification to the time during which there is an 495] *interest in a contract. We must give full effect to all the words of the section, and doing so we find that the defendant was not qualified to be an alderman during the time of his interest in these contracts, that is to say, the disqualification is temporary. That being so, as he is only disqualified during the continuance of the contract under sect. 28, and is not charged with acting during that time, he has not incurred any penalty under sect. 53 by acting afterwards. The appeal must therefore be dismissed.

MELLISH, J.: I am of the same opinion.

BAGGALLAY, J.A.: I am of the same opinion. In considering the 28th section it is necessary to bear in mind the 52d, for provision is made in that section for the cases in which there is a cessation of the office, namely, bankruptcy, insolvency, composition, or absence from the borough. In all those cases it is provided that the party shall immediately become disqualified, and shall cease to hold the office; and the section goes on to provide that on payment of creditors, or (in the case of absence from the borough) on return to the borough, the party being otherwise qualified shall be eligible for re-election. Had it been intended that a person once duly elected who had become disqualified by ceasing to hold a qualification, or by becoming interested in a contract should not be able to recover his status without re-election, that intention would have been expressed as in the 52d section. I think, in the absence of any such words in the 28th section, there is a clear indication of what the Legislature intended and that the Exchequer Division were right in the conclusion they came to.

QUAIN and ARCHIBALD, J.J., concurred.

Judgment affirmed.

Solicitor for plaintiff: *A. E. Francis.*

Solicitors for defendant: *Stephens & Stephens*, for Parrott, May & Sons, Macclesfield.

See 9 Eng. Rep., 374 note.

An employment by or under authority of the common council of a city of one of its members to render services for the city is against public policy, and an action cannot be maintained against the city for services rendered. The act of 1843 (ch. 57, Laws 1843) making it unlawful for a member of a common council to become a contractor under a contract authorized by the common council is but declaratory of the common law, and is not to be construed strictly: Smith *v.* Albany, 61 N. Y., 444, affirming 7 Lans., 14.

A commissioner who is appointed by a county court to "let out a contract" for certain road improvements, "and

to superintend the same," and who receives money to be used for that purpose, will be held responsible to the county for the money, if he fails to let out the contract, and cannot relieve himself by showing that he did the work himself, and that the amount received by him was actually expended by him in the improvements: Achison County *v.* De Armand, 60 Missouri, 19.

The mayor of Toronto, an incorporated city, secretly contracted to purchase, at a discount, a large amount of the debentures of the city, which were expected to be issued under a future by-law of the city council, and was himself afterwards an active party in procuring and giving effect to the by-law which was subsequently passed. Held, that he was a trustee for the city of the profit he derived from the transaction: City of Toronto *v.* Bowes, 4 Grant's (U.C.) Chy., 489, affirmed 6 id., 1.

A member of a municipal corporation agreed with another party to take a contract from the corporation for the execution of certain works in his name, the profits whereof were to be divided between the parties. Held, that such a contract was in contravention of the municipal act (16 Vict. ch. 181), and the court refused to enforce the agreement for a partnership; but the defendant having denied the existence of the partnership, which was established by the evidence, the bill was dismissed without costs: Collins *v.* Swindle, 6 Grant's (U.C.) Chy., 282.

It has been held, in Massachusetts, that a city may convey land by deed to a member of the city council, and one of the committee to which the matter was referred, if he does not take any part in the transaction officially, or, as agent of the city, convey to himself: Tucker *v.* Howard, 122 Mass., 529.

The question in this case arose between the grantee and a third person, who did not claim under the city and had no right, on behalf of the city, to avoid the transfer. We doubt whether the decision would have been the same had the question arisen on a contest between the city and the grantee wherein the city sought to avoid the transfer, although the court does not seem to make any such distinction.

Where one who is mayor and councilman has, without collusion or fraud, been employed as an attorney to appear for the city and defend a suit brought against it, there is nothing in his official relations to the city to preclude his recovering the value of the services actually rendered under such employment: Mayor, etc., *v.* Muzzy, 33 Michigan, 61.

[1 Exchequer Division, 496.]

June 21, 1876.

[IN THE COURT OF APPEAL.]

*Aspden v. Seddon and Another (1). [496

Preston and Others v. Seddon and Another.

Grant of Land reserving Minerals—Right to work Minerals, paying Compensation for Damage—Enforcing Claim for Compensation—Easement—Right to Support.

The owner in fee of an estate granted away a portion of it, which ultimately became the property of the plaintiff, but reserved a rent charge (subsequently redeemed), and also the minerals under the land so granted and the right to work them, paying compensation for all damage that should be done thereby to the erections on the land. The grantee (for the better securing of the rent charge) covenanted to build a mill on the land granted to him. The owner in fee afterwards granted to the defendants' predecessor in title the minerals, rights, and liberties so reserved, and also the other and adjacent portion of the estate. The defendants, who took with notice of the agreement as to the payment of compensation, worked the minerals under the plaintiff's land, and also the minerals under their own land, and by the operation of one or other of these workings, or by their joint operation, let down the surface of

(1) See 12 Eng. R., 773.

the plaintiff's land, and so injured the mill which had been built there in accordance with the covenant:

Held, affirming the decision of the court below, first, that the right to work the subjacent mines being subject to the condition of paying compensation, the plaintiff could maintain an action for the injury done to the mill by the working of those mines.

Secondly, that if the injury arose from the working of the mines under the adjacent lands, or from the combined effect of working those mines and the subjacent ones, the plaintiff was still entitled to recover.

THESE were two actions brought (1,) by the occupier and mortgagor in possession, (2,) by the mortgagees of a cotton mill and premises at Westhoughton, in Lancashire, against the defendants, as owners and workers of coal mines situated under and near to the mill, to recover compensation or damages for the letting down of the mill and of the site thereof by the working of the mines.

The action, *Aspden* v. *Seddon*, came on for trial at the Manchester summer assizes, 1875, before Archibald, J., and a special jury when, by agreement between the parties, a verdict was taken for the plaintiff in *Aspden* v. *Seddon*, and the record was withdrawn in the action of *Preston* v. *Seddon*, subject to a reference in each case of the cause and all 497] matters in difference, with power *to the arbitrator to raise for the opinion of the Court of Exchequer any preliminary questions of liability, without assessing damages or finding any disputed facts as to the causes or extent of the alleged damage. A case was accordingly stated, from which the following facts appeared:

William Stott, the owner in fee of an estate situated at Westhoughton, and of the mines and minerals thereunder, by an indenture dated the 31st of December, 1861, conveyed a portion thereof (subject to the exception and reservation hereinafter mentioned) to John Pilkington, as a trustee for the Westhoughton Cotton Manufacturing Company, Limited. The piece of land so conveyed was made subject to the payment to Stott and his heirs of a chief rent, which has since been redeemed. William Stott retained the residue of the estate in his own possession, and for the purpose of distinguishing it it is hereinafter called "the adjacent land."

The exception and reservation above referred to were in the words following: "Except and always reserved out of these presents and the direction, appointment, grant, and conveyance hereby made unto the said William Stott, his appointees, heirs, and assigns, all mines, veins, and seams of coal, cannel, and ironstone, and other mines and minerals lying within or under the said piece of land hereby appointed, granted, and conveyed, or any part or parts thereof

respectively, with full liberty, power, and authority for the said William Stott, his appointees, heirs, and assigns, and his, their, or any of their lessees or agents and workmen, and every or any other person or persons, by his, their, or any of their order or permission at any time or times, and from time to time to search for, get, win, take, cart and carry away the same, and sell or convert to his or their own use the said excepted mines, veins, and seams of coal, cannel, and ironstone and other mines and minerals or any of them, or any part or parts thereof, at pleasure, and to do all things necessary for effectuating all or any of the aforesaid purposes, but without entering upon the surface of the said premises or any part thereof, so that compensation in money be made by him or them for all damage that shall be done to the erections on the said plot by the exercise of any of the said excepted liberties or in consequence thereof."

*The indenture contained the following covenant: [498
"That he, the said William Stott, his appointees, heirs, executors, administrators or assigns, will, from time to time, and at all times hereafter make and pay full and reasonable compensation (the amount thereof to be determined in case of difference by two indifferent arbitrators or their umpire, as in the ordinary case of settlement of disputes by arbitration) for all damage, spoil, injury, or loss that shall or may from time to time be sustained by the owner, tenant, or occupier, tenants, or occupiers for the time being of the lands hereinbefore expressed to be hereby appointed and granted or any part thereof, or of any erections or buildings for the time being thereupon for by reason in respect or in consequence of the searching for, getting, working, or carrying away any of the hereinbefore excepted mines, minerals, or substances lying within or under the same land or any part thereof."

The indenture also contained the following covenant by the company for themselves, their successors, and assigns: "And (the said company, &c.) also will and shall, within twelve calendar months from the date of these presents, erect, and at all times forever afterwards maintain in good repair, upon the same piece or parcel of land, a substantial building, with proper outbuildings and appurtenances suitable for a cotton mill, and one or more messuages or dwelling houses, and that such buildings and appurtenances shall be built and maintained of good brick or stone or both, and with sound timber and materials, and in a workmanlike manner, and shall be roofed with slates or lead, and shall forever thereafter be fairly worth to be let to a tenant or

tenants at a rackrental of at least £150 a year, and will and shall, within thirty-six calendar months from the date of these presents, furnish and supply the said building to be erected as aforesaid, as and for a cotton mill, and at all times afterwards keep the same furnished and supplied with sufficient steam power and with mill-gearing and machinery of the most approved construction for spinning or manufacturing cotton."

A cotton mill and weaving shed were accordingly built by the company upon their land, together with gas-works, offices, and other buildings used in connection with the mill, and the whole was stocked with the usual machinery and
499] apparatus necessary *for the carrying on of the business of spinning and manufacturing cotton.

By an indenture of the 8th of September, 1863, William Stott conveyed to James Stott and his heirs, amongst other hereditaments, the portion of land which he had retained in his own possession, herein called "the adjacent land," and also all the mines, veins, and seams of coal, cannel, and ironstone and other mines and minerals, and all the marl and clay under the lands conveyed by the deed of the 31st of December, 1861, and also all the liberties, powers, and authorities which were excepted, reserved, limited, or granted to him, his appointees, heirs, and assigns, by that indenture, or expressed or intended so to be, and all and every the rights, privileges, estates, and interests, benefits, and advantages of or to which he was seised, possessed, or entitled in any manner howsoever under or by virtue of the same indenture, to hold the same lands, mines, minerals, and premises thereby granted and conveyed or expressed so to be unto the said James Stott and his heirs, subject to the covenants, agreements, and liabilities contained in the indenture dated the 31st day of December, 1861, and which by or on the part of the said William Stott, his appointees, heirs, executors, administrators, or assigns, were, or ought to be at any time or times, or from time to time thereafter observed, performed, fulfilled, or kept.

By an indenture of the 26th of July, 1871, James Stott conveyed to one of the defendants the land, mines, and minerals which were conveyed by the last mentioned deed of the 8th of September, 1863.

In May, 1871, the company was voluntarily wound up, and the liquidators sold their land and the mill and premises to the plaintiff Henry Aspden. The sale was completed by an indenture dated the 11th of August, 1871, which contained a clause of exception and reservation similar to the

clause set out above. The plaintiff, Henry Aspden, from the time that he so purchased the mill until the 10th of January, 1874, carried on the business of a spinner and manufacturer of cotton in the mill and premises.

In 1873 the plaintiff Henry Aspden mortgaged the mill and premises, and the mortgage subsequently became vested in the *plaintiffs in the action of *Preston and Others* [500 v. *Seddon and Another*.

After the 26th of July, 1871, the defendants (trading in partnership as "John Seddon & Co.") worked certain of the mines conveyed by the indenture of that date, and got coal lying under the land of the plaintiffs, and also coal lying under the adjacent land.

The plaintiffs allege (and for the purposes of this case it is admitted by the defendants) that, by reason of the defendants' workings under the plaintiffs' land, or by reason of their workings under the adjacent land, or by reason of their combined workings under both, the plaintiffs' land has subsided, and the mill and buildings have become ruinous and useless for the purpose of spinning and manufacturing cotton: and that, after several stoppages for repair, on the 10th of January, 1874, it became impossible, by reason of the subsidence, to continue to work the mill and machinery; and since that date the machinery has stood still, and the business of the plaintiff Henry Aspden has been stopped: and, further, that the security given to the mortgagees, plaintiffs in the second action, upon the mill and premises has been materially affected and diminished by such subsidence and by the condition of the mill and premises.

The defendants have always refused to pay any compensation for the damage done to the mill and premises, and have always denied their liability to do so.

On the 1st of January, 1874, the plaintiffs, Henry Aspden and his mortgagees, filed a bill in the Court of Chancery against the defendants to restrain them from working under or adjacent to the plaintiffs' land, and claimed damages and an account.

The defendants put in their answer, and the cause came on for hearing before the Master of the Rolls on the 16th of November, 1874, when a decree was made that the plaintiffs were not entitled to the relief claimed by their bill against the defendants or either of them, and it was ordered that all further proceedings should be stayed without prejudice to the right of the plaintiffs to bring an action at law for any damages they might have sustained by reason or in consequence of the defendants' workings in the bill *men- [501

tioned. The plaintiffs appealed to the Lords Justices, who affirmed the decision of the Master of the Rolls (1).

The questions for the opinion of the court were—

Whether, on the present or any amended pleadings, or on the facts found in the case, the plaintiffs in both actions or the plaintiff or plaintiffs in either of them, is or are entitled to recover compensation from the defendants for damage to the mill and premises occasioned—

(*a.*) By workings under the plaintiffs' land;

(*b.*) By workings under the adjacent land;

(*c.*) By combined workings under both.

(1.) All such workings being proper and according to the custom of the country?

(2.) All such workings being assumed to be improper and not according to the custom of the country?

And whether the plaintiff and plaintiffs, or either of them, are or is precluded by the decree and decision of the Court of Chancery from maintaining the actions or either of them?

May 1, 1876. *Herschell*, Q.C. (*Gully*, with him), for the plaintiffs: In order to justify what they have done the defendants must rely on the provisions of the deed under which they have only a qualified right, and they cannot say they will exercise the right, but have nothing to do with the qualification. They must be taken to have done these acts on the terms that they will pay compensation, the only terms on which they can do them, and an action on the case will lie. Except they justify under the deed there is a clear cause of action for trespass. [He cited *Morland* v. *Cook* (2).]

Crompton (*C. Russell*, Q.C., and *Archibald Brown*, with him), for the defendants: There is no privity between the parties to these actions. The case resembles that of a covenant which does not run with the land—for this is an attempt to attach a burden to the land which is unknown to the law: Notes to *Spencer's Case* (3); *Keppell* v. *Bailey* (4); *Richards* v. *Harper* (5).

502] *Further, the judgment of the Master of the Rolls is conclusive against the plaintiffs, for if the right claimed by them existed at all it could have been enforced in equity: *Tulk* v. *Moxhay* (6).

Herschell, Q.C., in reply.

May 2, 1876. BRAMWELL, B.: There were two cases of *Aspden* v. *Seddon* and *Preston* v. *Seddon* argued before us

(1) *Aspden* v. *Seddon*, Law Rep., 10 Ch., 394; 12 Eng. R., 773.
(2) Law Rep., 6 Eq., 252.
(3) 1 Sm. L. C., 7th ed., p. 95.
(4) 2 My. & K., 517.
(5) Law Rep., 1 Ex., 199.
(6) 2 Ph., 774.

yesterday, in which we will now give judgment. Our judgment is for the plaintiffs upon all the points. For my own part, I think, although the decision of these questions in the suit between the same parties in the Court of Chancery is a decision which is unfavorable to the plaintiffs there, it is in truth a decision in their favor here; because it seems to me that clearly there would have been an equitable remedy in Chancery if there had been none at law, that is to say, upon the authority of the case of *Tulk* v. *Moxhay* (1), and the others that followed on it, the defendants having taken their property with notice of a certain burden upon it, or with notice that it possessed a right with a burden attached to that right, would have been liable to the persons entitled to the benefit of that burden, even though there was no covenant that ran with the land. It seems to me, therefore, speaking with the reservation with which I always speak of equitable rights, that there would have been a remedy in the Court of Equity if there had not been one at law; and I collect that that was the opinion of the Master of the Rolls and the Lords Justices; but they were of opinion that there was a right at law, and so am I. Consequently, they dismissed the bill there, holding that, as it was a claim for damages and there was a legal remedy, that claim should have been enforced in a court of common law. I should mention that the proceedings in equity began before the coming into operation of the Judicature Act. We are under no difficulty as to the form of action, because the question put to us is, whether under any form of pleading which, however, Mr. Herschell very properly said, was a form of pleading such as would be good at the time when the pleading took place (2), the *plaintiffs would be [503 entitled to maintain these actions. I think they would.

The facts may be stated shortly thus: One Stott was the owner in fee of the whole of the property which is in question here. He granted the surface of a portion of the property to those under whom the plaintiffs claim. He reserved the mines to himself, that is to say, he did not grant them.

In that state of things there was a severance of the ownership of the surface and of the mines underneath. Now I deal for the present with the questions that arise with respect to the surface and the mines underneath that portion of the property. In that condition of things, if nothing else had taken place he would have been bound so to take his

(1) 2 Ph., 774.

(2) The action was brought and the pleadings were filed in 1875, before the Judicature Acts of 1873 and 1875 came into operation.

coal, if he took it at all, as not to injure the surface. But at the same time that the conveyance was made the grantees of the surface did that which for the purposes of this question would make it the same as though it had been done fifty years afterwards. Suppose it had been done fifty years afterwards, it would have been this: the owner of the surface I will say—I will suppose the two estates to be effectually severed—granted to the owner of the subjacent mines a right to take the whole of the coal and minerals underneath, though in so doing the surface and what was on it should be let down, but he granted that right, and he gave that license, so that compensation in money be made by the grantee or his assigns for all damage that should be done in the exercise of what are called the excepted liberties, or in consequence thereof. The defendant is an assignee of the mines, and he has under and by virtue professedly—because, unless it is so, it is a tortious act on his part—of that license so granted to him, worked his mines in such a way as to let down the plaintiffs' surface.

Then the plaintiffs say, You having exercised the license which was coupled with—I do not know whether "condition" is the right word; condition-precedent certainly is not, because the right to the compensation does not accrue till after the act has been done and mischief has resulted from it;—with that corresponding duty on your part, you having exercised that right subject to that obligation on your part, or to that condition, whichever is the right word—must now make me compensation. This the defendants have refused to do. It really does seem to me plain
504] that they are bound *to make that compensation, and it is a compensation the ascertainment of which is provided for, that is to say, it is compensation which is to be agreed upon between them, or if they dispute it is to be ascertained by arbitrators. If the defendants will not appoint an arbitrator, the result is that they are liable to an action, because they have failed to do that duty which they in my judgment took upon themselves to do when they exercised that license. I have a strong opinion upon the utter unreasonableness of what would be the law if it were not what we are pronouncing it to be. It certainly is a very strange thing indeed that no case could be found which could be said to bear upon it.

I do not know that one could gain much by putting examples, but I put this case to Mr. Crompton, who argued for the defendants: if a right of way be granted, the grantee paying a penny for each time of user,—and in order that no

difficulty be made about it, we will say such payments to be made quarterly or yearly,—the grantee cannot be challenged for trespass, because he could show the grant of the right of way. Is there to be no remedy for the agreed price of the user? It seems to me impossible that that could be so. Take another case, the grant of a right to erect a dam which would turn the water back to the grantor's premises, upon the terms of making compensation for any damage that might result. If the common law gave no remedy in such a case as that against the person who would—unless he availed himself of this conditional license, or this license accompanied with an obligation on the part of the person using it—be the actual wrongdoer, it seems to me it would be much more defective than I have been accustomed to consider it ever since I have had acquaintance with it. Whether the correct form of action would be assumpsit, or an action on the case, I think it is unnecessary to consider. For aught I know, it may be that the remedy is in tort, though I think not on the ground that the defendant, by not paying the compensation, as it were, defeated his license; but, fortunately, as I said before, we are not dealing with the question as to how the plaintiff should declare; it is enough for us to say, as we do, that in this case there is a remedy at common law for the compensation stipulated to be paid when the license is exercised.

I have limited my observations at the present moment to the *case of the subjacent mining, but another ques- [505
tion arises in this way; the grantor of the land to those under whom the plaintiffs claim was also the owner of adjacent land not included in the grant, and a question is put to us whether, if the plaintiffs' premises were injured by working in the adjacent land, they have any right of action against the defendants. Now the case is somewhat curious. The grantor of the land to those under whom the plaintiffs claim stipulated that, for securing the rent charge which he took as the consideration for the grant, the grantees should build on it a substantial building, and they did build on it a substantial building. There is no covenant on the one hand by the grantor that he will not work the adjacent land so as to injure that building, and there is no license to him to work it injuring the building, and consequently there is no provision as there is in the other matters I have mentioned, that if he does injure it he must make compensation for it. I am very much inclined to think that there is here what one may call a compensation of errors, that is, it is very likely that the grantor, Stott, would, if he had thought

of it, have reserved to himself the right to work under the adjacent land in the same way as he reserved, or caused to to be granted to him, I ought more technically to say, the right to work in the subjacent mines. But then it is more than probable that if he had claimed to do that, and at the same time stipulated for the erection of this building, the grantees of the land on which the building was to be built would have claimed and have introduced into the deed an obligation on his part to compensate them, just in the same way as in the case of working the subjacent strata. Of course we must not decide the case upon the footing that two mistakes have been made, but we must take it upon the materials with which the parties have furnished us and the agreement actually come to. It seems to me, under these circumstances, quite certain that if no building had been put by the plaintiffs or those under whom they claimed upon their land, and the defendants had so worked their mines in the adjacent land as to cause the surface of the plaintiffs' land to fall in, in that case the plaintiffs would have been entitled to maintain an action against them. The plaintiffs certainly would be entitled to recover if the defendants' mines in the adjacent land had been so worked
506] *that the plaintiffs' land would have come down whether there was a house there or not. But further than that, I think that even if the plaintiffs' land would not have come down without the additional weight of the house, they are entitled to maintain this action; and for this reason: when Stott granted the surface to the grantees under whom the plaintiffs claim, with the stipulation that those grantees should build on that land, then by the application of the doctrine of the disposition of the owner of two tenements, he, by implication, granted to the grantees that he would so use his adjacent land that the house which the grantees were to build should not be let down by his operations upon it. Therefore it seems to me, on that ground, the plaintiffs are entitled to say, You have taken your land with the burden of so using it that the house that we build on our land should stand; in other words, we have an easement against you, not only for the natural support of land unbuilt upon, but for support to build upon land.

I think, therefore, that the plaintiffs are entitled to recover for any damage that may have been done to the mill upon two grounds: first, if in fact the land has not been so burdened that the house has come down in consequence, they would be entitled to maintain the action; but even supposing it is extra burdened, and the ground has come

down in consequence, then I think they are entitled under that law of the disposition of the owner of two tenements. The result is, therefore, that I think they are entitled to maintain their action against the defendants for damage to the mill and premises occasioned by the workings under their land, by the workings under the plaintiffs' land, and certainly as a consequence by combined workings under both, all workings being proper and in accordance with the custom of the country.

The second question assumes the working not according to the custom, but Mr. Herschell said he should not rely on that, therefore it is not necessary to express an opinion upon it.

The third question is, whether the plaintiff and plaintiffs, or either of them, are or is precluded by the decree and decision of the Court of Chancery from maintaining the actions, or either of them, and the ground of that was that the defendants said it was *res judicata*. I am of opinion that it really is not. If there was any *res judicata* at all, it was that they could maintain an action. *Therefore I an- [507 swer that in favor of the plaintiffs also. On these grounds I think our judgment should be altogether for the plaintiffs.

CLEASBY, B.: I am of the same opinion. I think the action is maintainable to recover compensation for injury to buildings by the working of the subjacent mines. I shall confine my judgment to that which is the main question, and adopt entirely what has been said by my learned Brother upon those other questions, which are not of so much importance. One person is the owner of the surface, another is the owner of the mines. Sometimes there is a difficulty from not knowing exactly how they became separated and what the state of circumstances was, but here we know exactly. I do not think it would be argued that it makes any difference that the same person, being the owner of both, grants away the surface, reserving the minerals, or being the owner of both, reserves the surface and grants the minerals. He grants the minerals subject to this, that in case the minerals are worked, compensation shall be made for injury to the buildings that it is intended shall be erected upon the land; and it appears to me that under those circumstances, if the grantee of the minerals entered, searched for mines, and did injury to the buildings, he would be liable. If he sold the minerals, and the person to whom he sold them continued the search, and continued the working of the minerals, and continued to injure the building, he would be liable; and so, again, as long as any person, pos-

sessed of the minerals by the same title as the grantee, exercised the right—which he must be taken to do rightfully, not wrongfully—of searching for minerals, and produced the result contemplated by the grantee of the minerals, each would be responsible successively for the injury he did. I adopt the reason given by my learned Brother. It is remarkable that we have not had a reference to any authority upon this subject. It could not be treated as a covenant, and therefore as a matter running with any title, but only as a liability. To see how an action at law could be maintained, I have been referring to Viner's Abridgment. There, under Debt C, placitum 8, is a reference to a case in the 7th volume of the Reports, which, although not the same, 508] *I think presents a very close analogy. It is *Lillingston's Case* (1). It was resolved that, "Where a man grants a rent charge for life, and the rent is in arrear, and the grantor,"—that is, the person seised of the land,—"enfeoffs A. of the lands, and the rent charge is in arrear in the time of A., and then A. enfeoffs B., and the rent charge is in arrear in his time, and then the grantee of the rent charge dies, his executor shall have an action of debt against every one of them for the rent which was in arrear respectively in their times;" and the reason given is a very excellent one, certainly equally applicable to this case, for the only reason given is, "*for qui sentit commodum sentire debet et onus.*" Thus there is no liability arising out of contract; the only liability arises out of this, that the man has enjoyed the land. That is where I say it is only an analogy, not a case in point, because the man has enjoyed the land, and during the time that he has enjoyed it a certain liability and risk in respect of it have accrued. Then the law says, You ought to bear the burden because you have enjoyed the land. There is no necessity imposed, it is not a burden in that sense, it is optional with him whether he exercises the right or not. It makes no difference whether it is mines or land. During the time that you have enjoyed the land this burden, one may say, came into existence; that is, the yearly rent has become due. Here you have enjoyed these mines, you have enjoyed this licence. During the time that you enjoyed it this burden—that is, this obligation to make compensation for what you have done—has come into existence. I think, therefore, our judgment ought to be for the plaintiffs.

Judgment for the plaintiffs.

(1) 7 Co. Rep., 39 b.

Against this judgment the defendants appealed.

1876. June 21. *Manisty*, Q.C., and *Archibald Brown* (*Crompton* with them), for the defendants, contended that the judgment of the Exchequer Division was wrong.

Herschell, Q.C., and *Gully*, for the plaintiffs, contrà.

JAMES, L.J.: Unless the authorities compel me to decide differently from the judgment of the court below, I should not be *much disposed to hold that the law of Eng- [509 land can be in such a state that the defendants could be authorized to commit a trespass in opening a mine, and should justify doing so under an authority in which there is a qualification, but should refuse to pay anything in the way of compensation under the terms of that qualification. The grantor heresaid, "I reserve to myself, my heirs, appointees, and assigns, the right of taking the minerals which are supporting your house, I and they paying all compensation." The law seems to me plain that a man exercising the right is to pay the compensation. There is no new charge created by the plaintiffs, the simple thing is that the man who has exercised the right is to pay for the damage. The law is so, and I think that it ought to be so.

MELLISH, L.J.: I am of the same opinion. It is certainly rather remarkable that there should be no direct authority either for or against the right to maintain an action of this description. I have no doubt it is a well known principle of law that you cannot annex to land a burthen which is unknown to the law, that is, have a sort of burthen of your own and annex it to the land and make it run with the land from one owner to another. That is a thing which cannot be done. Nothing can be annexed to the land, except a well known legal interest of the owner of which the law takes notice. The right here is simply a right on the part of the owner of the minerals to get all the minerals so as to let down the surface. I think it does not make the least difference whether the separation of the surface and the minerals has taken place by the man who was owner of both granting away the surface, or whether it takes place by the man who was owner of both granting away the minerals. In the one case it is a reservation no doubt, and in the other a grant. Then the next thing is, can you annex this condition to that grant, and give a right to let down the surface subject to the condition? I think they may say, "You shall let down the surface, but you shall only do that *sub modo* that the man, whoever does let down the surface by getting minerals, shall pay compensation." I presume that ever since the ownership of the surface and the minerals has

been separated, it has been the common practice to make it
510] *part of the conditions, that if the surface is let down compensation shall be paid. I think very numerous cases may be found where it has been proved as a custom from time immemorial for the lord of the manor to be at liberty to get the coal in copyhold tenements, paying compensation for the damage which he may cause by getting it. Sometimes the custom is that the copyholder gets it, or if there is no custom at all, neither party can get it; but I apprehend there may be a well known and perfectly legal custom that the lord of the manor may get all minerals under the copyhold lands, paying compensation to a copyhold tenant for any damage he may do in respect of the surface in getting them. Inclosure Acts constantly give the same right. That being a perfectly well known right, and existing and binding, in the absence of direct authority to the contrary, we should do very wrong if we held that the right claimed in this case did not exist. It does not impose any unusual burthen. I think it would be most unjust that the owner of the minerals, having got them under the express terms that he should not let down the support to the surface, should get the minerals and let down the buildings, and not pay compensation for doing so. I am of opinion that the judgment of the court below should be affirmed.

BAGGALLAY, J.A., and QUAIN, J., concurred.

Judgment for the plaintiffs affirmed.

Solicitors for plaintiffs: *Pritchard, Engleſield & Co.*, for Charles Costeker, Over Darwen.

Solicitors for defendants: *Sharpe, Parkers & Co.*, for Taylor & Rowbottom, Wigan.

CASES

DETERMINED BY THE

PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE,

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS,

XXXIX VICTORIA.

[1 Probate Division, 292.]

April 4, 1876.

*THE LIMERICK. (7318) (1). [292

Wages and Disbursements—Bond given by Master in respect of a Collision admittedly occasioned by Negligence of Master—Liability of Master for Necessaries.

A sailing vessel lying at anchor in a foreign river was run into and damaged by an English steamship, which was at the time under charter to proceed to a neighboring port for a perishable cargo. The master of the steamship, acting in the interests of his owners and in order to prevent the arrest and detention of his vessel at the port where the collision occurred, executed a bond acknowledging the liability of his vessel, and binding himself and his owners for the payment to the owners of the vessel run into of the damage their vessel had sustained.

In an action of wages and disbursements brought by the master against his vessel he claimed to recover, as a disbursement for which he was liable, the amount of the penalty of the bond:

Held, that the amount of the penalty of the bond must be retained in court out of the proceeds of the vessel, to answer any claim which might be established against the master under the bond.

(1) Reversed in part, *post*, p. 450.

1876 The Limerick.

THIS was a cause of wages and disbursements carried on on behalf of the master of the steamship Limerick against the said vessel, and against C. J. Jutson, an alleged mortgagee of the vessel, intervening as defendant.

The plaintiff claimed to recover in the action, *inter alia*: 1. A sum of £200, being the amount of the penalty of a bond given by him in the circumstances hereinafter mentioned, in respect of a collision between the Limerick and a vessel called the Skitty Belle, which occurred in Huelva river, in the month of February, 1876; and, 2. A sum of £102 0*s.* 2*d.*, alleged to be due to Messrs. Dowson & Worth, shipbrokers, on account of necessaries supplied to the Limerick.

On the 14th of July, 1875, the claim of the plaintiff was pronounced for with costs, and was referred to the Registrar, assisted by merchants, to report thereon.

In the claim of the plaintiff filed in the registry the abovementioned sums of £200 and £102 0*s.* 2*d.* were set forth as disbursements, and in an affidavit made by the plaintiff he deposed, in the 20th and 22d paragraphs thereof, as follows:—

"20. In the month of February, 1875, the Limerick came into collision with the schooner Skitty Belle in Huelva river owing to the strength of the tide, and as the Skitty Belle was at anchor it was clear that the Limerick was to blame.
293] *I paid to the master of the Skitty Belle the sum of £40 on account of his damages, and the Limerick was allowed to leave Huelva on my giving a bond on behalf of myself personally and the owners of the vessel for the sum of £200, to cover such damages as might be ascertained. No claim has yet been made on me under the said bond, but I am personally liable should such claim be made. I am informed that the owners of the Skitty Belle are suing Mr. Jutson, one of the owners, for the same; but although I have no personal knowledge of the suit, I have reason to believe he is defending the said action on the ground that, although he is on the register as an owner, he was really only a mortgagee of the said vessel, and had no beneficial interest; and I am advised and believe that it is a very doubtful question whether he is liable or not under the circumstances, and, in the event of his not being so liable, in all probability I shall be called upon to pay the amount of the said bond, or so much as is due thereunder.

"22. The amounts specified in my claim in this suit as due to Messrs. Dowson & Worth . . . . are justly due and

owing from the said vessel, and, to the best of my knowledge and belief, I am personally liable for the said amounts."

The reference was commenced on the 13th of December, 1875, when the plaintiff was examined in support of his claim, and was continued on the 12th and 14th of February; further evidence on behalf of the plaintiff being taken on the former of the two last mentioned days.

The following evidence material to this report was given by the plaintiff at the reference:—

"The collision occurred at Huelva, owing to strength of tide, and yet I was wrong. My ship was unmanageable. I did all I could to prevent it. I paid under protest, and noted protest. If anybody on board my ship was wrong I was wrong. I did not communicate with any one in England before I gave the bond There is a telegraph, but there was fruit waiting for me at Lisbon, and I had to go on for it. I came to the conclusion that the Skitty Belle was not to blame as soon as the accident had happened. It was about four in the afternoon. I went on shore three or four minutes after the accident. I think it happened on a Tuesday, and I executed the bond on the day after in the afternoon. I telegraphed to Mr. Ireland (') to tell him of the collision either the day of or the day after the collision, and told him to wire me to Lisbon. I left Huelva the day but one after the collision. The ship lay there two days, but I had an expectation to get away on the following day but I could not finish my repairs soon enough.

"Mr. Port took me and introduced me to Messrs. Dowson & Worth, telling them that the Limerick was not one of their ships, they only managed her. I can't account for the bill being made out only to the owners. I in the first place sent to Messrs. Dowson & Worth for their account. I didn't know whether I was liable or not, and wished to have all the accounts. I should say that that is the account they sent me. They didn't at the time make any demand on me. I didn't hear personally from them until two months ago. They have not sued me nor threatened me with a suit.

*"I got an answer from Mr. Ireland to the effect [294 that the Limerick was insured in a Collision Club. He had never blamed me for giving the bond. He told me to make up a statement of all that had been done and he would see to it then. I know Mr. Jutson. I have talked to him about it. He told me that I had no business to give the bond,

(') One of the then owners of the vessel.

and that he should oppose it. I told Mr. Jutson about the bond at Harwich. He came down there to look at the vessel about buying her in conjunction with another gentleman down there. Mr. Jutson said some one was suing him on the bond, and that he should oppose it. He told me because he was half owner on the register. But he told me he was not half owner, as he had sold out, but hadn't got the money, and he didn't know that he was liable. I gave the bond under the advice of the British Consul. Unless I did so the shipwould have been arrested there."

The bond given by the plaintiff at Huelva was brought into the registry: omitting the immaterial portions, it was in terms as follows:—

"British Vice-Consulate, Huelva.

"Agreement between Mr. Sheriff Hopkins, master of the steamship Limerick, and of Liverpool, on behalf of the owners, underwriters, and all others concerned in the said vessel, and Mr. William Rees, master of the brigantine Skitty Belle, of Swansea, for and on behalf of the owners and all others concerned in the said brigantine.

"Mr. Sheriff Hopkins, acknowledging, as he does by these presents, the liability of the said steamship Limerick to the payment of the damages, losses, detentions, costs, and expenses sustained by the brigantine Skitty Belle in consequence of her being run into by the said steamship Limerick under his command, hereby binds himself, owners, underwriters, and all others concerned in the said vessel to the payment of the said damages, losses, detentions, costs and expenses in the manner and with the conditions hereinafter stated."

[Here followed certain stipulations for the payment of the repairs of the Skitty Belle, occasioned by the collision, and of the compensation to be paid in respect of her detention while undergoing such repairs.]

"6. On signing these presents Mr. Sheriff Hopkins will be at liberty to proceed with the said steamship Limerick on her intended voyage without any further hindrance or detention on the part of the owners, master, or others concerned in the Skitty Belle.

"For the faithful performance of the foregoing agreement 295] Mr. *Sheriff Hopkins binds himself, the owners of the steamship Limerick, and all others concerned, in the penal sum of £200, to be paid unto the owner and owners of the said brigantine Skitty Belle, his or their heirs, executors, administrators, or assigns.

"Thus done, signed, sealed and executed at Huelva on this 6th day of April, 1875.

(Signed) "S. Hopkins.
"W. Rees.

"Before me (Signed) Edward Diaz,
"British Vice-Consul."

The following letter relating to the amount which the plaintiff claimed as a disbursement due from him to Messrs. Dowson & Worth was also brought in:—

"49 Lombard Street, 13th March, 1876.

"Captain Hopkins: Dear Sir,—We are sorry to have to trouble you again with regard to our account against the Limerick, but as Mr. Jutson denies his ownership and Mr. Ireland has failed, we must apply to you for payment. Our contract was made with you, and you are equally liable as master of the vessel. Yours faithfully,

"Dowson & Worth."

On the 16th of February the Registrar made his report; the material portions of it were in terms as follows:—

"Whereas in a cause of wages and disbursements which was instituted in the High Court of Admiralty of England on behalf of Sheriff Hopkins, master mariner, master of the vessel Limerick, the plaintiff, against the said vessel, and against C. J. Jutson, alleged to be a mortgagee of the said vessel, the defendant, intervening, the judge of the said court did, by his decree of the 14th of July, 1875, pronounce in favor of the claim for wages and disbursements, together with costs, and did refer the said claim to the Registrar, assisted by merchants, to report the amount thereof due thereon: and whereas the said cause is now pending in the Admiralty Division of the High Court of Justice,

"Now I do most humbly report, &c., I find that there is due to the plaintiff the sum of £1,048 19*s.* 7*d.*, with interest from the date of this report, as well as the costs of these proceedings. I am also of opinion that the plaintiff is entitled to the sum of £200 retained in court to answer any claim that may be established against him under the bond given by him in respect of the collision between the Limerick and the Skitty Belle. I am further of opinion that the plaintiff is entitled to payment of the amount found due to him out of the proceeds of sale *of the vessel Limerick that may be now remaining in court [296 in priority to all other claims."

In the schedule annexed to the report were, *inter alia*, the following items:—

	Allowed. £	*s.*	*d.*
"50. Bond for £200 given by the master in respect of a collision between the Limerick and the Skitty Belle	200	0	0
54. Dowson & Worth, Shipwrights	102	0	2

with interest at 4 per cent. per annum from the 16th of February, 1876, until paid."

The defendant's solicitors gave notice that they objected to the report of the Registrar, and filed a petition on objection, which in the 4th, 5th, and 6th paragraphs contained the following allegations:—

4. The defendant objects to the said report in so far as it finds that the plaintiff is entitled to have the sum of £200 retained in court to answer any claim that may be established against the plaintiff under the bond given by him in respect of the collision between the Limerick and the Skitty Belle, upon the grounds that such bond was given by the plaintiff without authority from, or due communication with, the owner of the Limerick; that the plaintiff himself was, at the time of the collision, conducting the navigation of the Limerick, and that he was personally liable in respect of the damage done to the Skitty Belle, by reason of the said collision, at the time when he executed the said bond.

5. And the defendant also objects to the said report in so far as the same allows to the plaintiff, by item 54 of the schedule thereto, the sum of £102 0*s.* 2*d.* in respect of a claim by Dowson & Worth, shipwrights, upon the ground that such sum never was claimed of the plaintiff by the said Dowson & Worth, and has never been paid by the plaintiff to the said Dowson & Worth, and that the plaintiff never was liable to the said Dowson & Worth in respect of the said claim.

6. And the defendant also objects to the said report in so so far as it allows interest on the sum of £1,048 19*s.* 7*d.* from the 16th of February, 1876, until paid, upon the ground that interest should only have been allowed on part of such sum, inasmuch as large sums found due to the plaintiff by the said report have not been paid out of pocket by the plaintiff, but were still due and owing by him at the date of the said report, and will be paid out of the proceeds of the said ship in the registry without interest.

The answer or objection alleged, *inter alia*, as follows:—

2. The bond referred to in the 4th article of the petition was given on behalf of the owners of the Limerick by the plaintiff, acting under the advice of the British Consul at Huelva, in Spain, where the collision occurred, and for the best interests of the owner of the Limerick, in order to prevent her arrest and detention in the port of Huelva and consequent expenses and loss of freight, and was, as they submit, within the scope of the plaintiff's au-
297] thority. The act of the *plaintiff in giving this bond was approved and ratified by Frederick Ireland, the then managing owner of the Limerick. Insurances had been effected by the said Frederick Ireland for and on behalf of the owners of the Limerick against loss by collision, and the amount of the said bond has been, or might have been, recovered from the underwriters of the

said insurances for the benefit of those interested in the Limerick.

3. They deny that the plaintiff was personally liable in respect of the damage done to the Skitty Belle, by reason of the collision referred to in the 4th article of the petition.

4. They say that Messrs. Dowson & Worth have claimed of the plaintiff the sum allowed in item 54 of the Registrar's report, and they submit to the court whether the plaintiff is liable or not in respect of the said claim.

5. They submit to such an alteration being made in the report as will reduce the item on which interest is allowed from the date of the report by those which are liabilities only and not payments out of pocket. The amount of such items, however, is only £149 16*s.* 11*d.*, and the interest thereon as allowed is very trifling, and not such as should be made matter of appeal.

March 21. *E. C. Clarkson*, for the defendant, in objection to the report of the Registrar: The master of the Limerick is, on his own evidence, personally liable for the damage sustained by the Skitty Belle in the collision with the Limerick, and the court will not in any way assist him to escape such liability. A personal action at the suit of the owners of the Skitty Belle would clearly lie against the master as well as against the owners of the Limerick (*The Volant*.(1)), to recover the very damages in respect of which the bond was given, and the master, being himself a wrongdoer, could not have recovered over from his owners the amount he would have been compelled to pay in such action, how then can he place himself in a better position by having turned the claim of the owners of the Skitty Belle from an unliquidated into a liquidated amount? The circumstances of the present case are analogous to those in the case of *The Ida* (2), and in that case the court, though no decision was given on the point, would seem to have been of opinion that a master was only justified in raising money to obtain the release of his vessel detained in a foreign port in a case where a lien on the ship existed. As to the amount which the master alleges he is liable to pay to Messrs. Dowson & Worth, it is clear on the evidence that credit was primarily given to the owners of the Limerick, and that they dealt with the *master as an agent only, he [298 therefore cannot in the circumstances be allowed to charge the amount against them as a disbursement.

W. G. F. Phillimore, for the plaintiff, contrà; In giving

(1) 1 W. Rob., 383.

(2) Law Rep., 3 A. & E., 542.

the bond for £200 the master of the Limerick exercised a wise discretion, and acted wholly in the interest of his owners. If such bond had not been given the Limerick would in all probability have been arrested at Huelva, and have been prevented from earning her freight. In case the vessel had been actually arrested, can there be any doubt that, in the circumstances, the master would have acted rightly in taking steps to release the vessel? If so, the same considerations must surely apply where, as here, the master knowing that a detention at Huelva would entail a loss on his owners, and being advised that his vessel was to blame for the collision, has given security to pay the amount of the damage done. The bond was given under the sanction of the British Consul, and, in fact, not only has there been a settlement of account with the master since the collision, but his act in admitting liability was ratified by his owners. The case of *The Ida* (') is not in point, the question there really before the court being in what circumstances a ship's agent abroad could take a valid bottomry bond from the master of a vessel for which he was agent. It is true that the owners of the Skitty Belle could have brought a personal action against the master to recover for the damages done in the collision, but it is another thing to hold that the owners of the Limerick, if compelled to make good such damage, could have recovered over from their servant, the master, where, as in this case, no fault except that of error of judgment can be attributed to him. The master has had notice that Messrs. Dowson & Worth looked to him for payment of their bill.

E. C. Clarkson, in reply.

Sir Robert Phillimore: I am asked to overrule the decision of the Registrar on two points in this case. One is as to a sum of money due to Messrs. Dowson & Worth of £102 0*s*. 2*d*., which the Registrar has allowed, I understand, on the ground that it is at least doubtful whether the master
299] be not liable to those who *furnished the articles for the benefit of the ship, and I think it doubtful, in spite of the argument which has been addressed to me. I think it is very possible myself that the master may be found liable for the £102 0*s*. 2*d*. which has been advanced to Dowson & Worth; at all events, it is certainly a question as to which I should be sorry to give an off-hand opinion as to whether or not he may not be liable. But I think the justice and equity of the case will be answered by allowing the mortgagee to have the £102 0*s*. 2*d*. upon his giving security

(') Law Rep., 3 A. & E., 542.

that if the master be found liable for this sum he will repay him.

That seems to me a fair proposition, and I think the same principle applies to the other item. The bond given by the master of the Limerick for £200 in respect of the collision between the Limerick and the Skitty Belle, falls under the category of those cases decided in this court, where the conduct of a master, acting *bona fide* for the purpose of getting his ship out of arrest in a foreign country, has always been upheld where no *mala fides* is shown (1). It may be that he is not personally liable under this bond, or it may be that he is personally liable; but I think that what he did was for the benefit of the ship, and for the benefit of the owners, and I think it would be a harsh thing to deprive him of a lien he would otherwise have had on the ship. I do not however see what harm will happen if the £200 should have to be paid out of court to the defendant on his giving security to repay the amount to the plaintiff in case he should be found liable on the bond. I am ready to make this modification of the Registrar's report, but I am not disposed to go further.

The minute of the order as entered in the registry was as follows:

"The judge, having heard counsel on both sides, adjourned for a fortnight the further consideration of the objection to the Registrar's report in this cause, for the purpose of allowing the defendant to give within fourteen days, if he shall think fit, a valid guarantee to secure the plaintiff in respect of the sum of £102 0*s.* 2*d.*, claimed by Messrs. Dowson & Worth, being item No. 54 in the schedule annexed to the said report, and in respect of costs, if he shall *be sued for the same, and also in respect of any [300 claim that may be established against the plaintiff, under or in consequence of the bond for £200 given by him and referred to in item No. 50 of the schedule to the said report."

April 4. *W. G. F. Phillimore*, on behalf of the plaintiff, moved the judge in court to confirm the Registrar's report, the defendant not having given the security ordered by the court, and that the costs of the application, and all costs occasioned by the objection to the said report, might be costs in the cause if the said report should stand confirmed.

E. C. Clarkson, on behalf of the defendant.

His Lordship confirmed the Registrar's report, save as to interest, and pronounced the sum of £1,048 19*s.* 7*d.*, the amount set forth in the said report, to be due to the plain-

(1) See *The Karnak*, Law Rep., 2 A. & E., 289; 2 P. C., 505.

tiff, but with interest only on the sum of £872 13*s.* 6*d.*, at the rate of 4 per cent. per annum from the date of the report until payment thereof, and condemned the proceeds of the Limerick in the said sum of £1,048 19*s.* 7*d.*, interest and costs, save the costs of the objection to the report, as to which he made no order.

Solicitors for plaintiff: *Lowless & Co.*
Solicitors for defendant: *Linklater & Co.*

[1 Probate Division, 300.]

May 16, 1876.

In re SMITH and Others.

Practice—Jurisdiction in respect of Damage done by a Foreign Ship on the High Seas—Supreme Court of Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *Schedule* 1, *Order* II, *Rule* 4, *Order* XI, *Rule* 1.

A ship sailing under a foreign flag, and belonging to a foreign company established abroad, came into collision with, and did damage to, an English ship on the high seas. The owners of the English ship applied for leave to issue a writ of summons, of which notice should be given out of the jurisdiction, claiming compensation for the damage, against the foreign company. Leave refused.

The phrase, "within the jurisdiction," used in the Judicature Act, 1875, sch. 1, Order XI, Rule 1, means territorial jurisdiction.

[1 Probate Division, 311.]

April 8, 1876.

[IN THE CONSISTORY COURT OF LONDON.]

311] **In re* THE RECTOR AND CHURCH-WARDENS OF ST. GEORGE-IN-THE-EAST.

Faculty—Churchyard closed for Burials under Order in Council—Public Garden—Discretion of the Court in Faculty Cases.

On an application for a faculty to sanction the appropriation of a portion of a churchyard, which had been closed for burials under an Order in Council, for the purpose of a public garden, the court authorized the construction of footpaths in such portion of the churchyard for the convenience of the parishioners, and the erection of gates to give them access to it.

IN this case an application was made to the Consistory Court of London, praying for the grant of a faculty to enable the rector and the church-wardens of the parish of St. George-in-the-East to make certain alterations in the churchyard of the said parish, and to appropriate a portion of the same for the purpose of a public garden, at the promotion of the said rector and church-wardens.

The petition to lead the faculty alleged in substance as follows:

It being thought desirable to form a public garden at the east end of the churchyard of the parish of St. George-in-the-East with proper access thereto, a committee was appointed to consider the same and report thereon.

The report of the said committee recommended, *inter alia*, that the wall separating the churchyard from a disused burial ground attached to the Wesleyan chapel, as shown in a plan annexed to the petition, should be taken down.

A vestry meeting duly convened for that purpose was held on the 2d of December, 1875, at which the said report was read and considered, and the before-mentioned plan submitted, when it was unanimously agreed that so much of the said report and plan, as related to the proposed alteration in the churchyard of the said parish by appropriating part thereof to a public garden, be approved of, and that a faculty be applied for to carry out the same.

Such proposed alterations, so far as relates to the churchyard, will consist of pulling down the boundary wall between the church and chapel burial grounds at the north side thereof, and constructing a dwarf boundary wall where indicated by the dotted line shown in the said plan, with an iron railing thereon.

*The churchyard of the said parish has been [312 closed for several years under an Order in Council issued for that purpose. None of the bodies or remains will be removed from that portion of the churchyard which is to form part of the proposed public garden, but the memorial stones will be carefully removed therefrom and placed against the interior wall of the inclosed churchyard.

The estimated expense of the said alterations, so far as respects the taking down the said wall of the churchyard and constructing a new wall with iron railings thereon, and the removal and the replacement of the memorial stones as aforesaid will be about £500, and will be defrayed by the vestry out of the rates levied pursuant to the Metropolis Management Acts.

Your petitioners therefore humbly pray that you will be pleased to decree a license or faculty for the purposes aforesaid.

The usual citation with intimation issued and was duly served, but no person appeared to oppose the grant of the faculty, and on the 6th of March last Dr. *Deane*, Q.C. (*W. G. F. Phillimore* with him), on behalf of the petitioners, applied to the court to decree the faculty to issue as prayed.

They referred to 18 & 19 Vict. c. 120, ss. 158–161, *Reg.* v. *Twiss* (1), and *In re Bettison* (2).

On the 27th of March the case came again before the court, and after certain witnesses on behalf of the petitioners had been orally examined, the learned chancellor personally inspected that portion of the churchyard which the petitioners proposed should be appropriated for the purposes of a public garden.

Cur. adv. vult.

April 3. Dr. Tristram: This was an application to the court by the rector and church-wardens of the parish of St. George-in-the-East, to issue a faculty authorizing them to appropriate the further or lower end of the eastern portion of the parochial churchyard as a public garden, and to make proper access thereto, and other alterations in furtherance of the said object.

On the faculty being moved for, it seemed to the court that there were objections to granting it in the terms prayed; but as the application was made in accordance with an unanimous vote of the vestry, and with the general concur-
313] rence of the parishioners, *the court directed the case to stand over for further evidence and for consideration. In the interval I have inspected the churchyard, and the rector, the church-wardens and vestry clerk, attended a court held on Monday last, and gave further evidence and explanations in support of the application.

The application in question relates to that part of the eastern portion of the churchyard which is furthest from the church, comprising a narrow strip of the old churchyard and a considerable piece of ground which was acquired by the parish by purchase out of the church rates in 1829, and was then added to the old churchyard and consecrated.

In 1856 the churchyard was by an Order in Council closed for burials.

This addition to the churchyard has been but little used for burials. It contains a few gravestones but no grave mounds. It is planted with some clumps of trees and flower beds, and there are gravel walks across and around it. It abuts on the south side on Ratcliffe Street which leads into Ratcliffe Highway, on the north side, on a Wesleyan burial ground running up to Cable Street. It is fenced in on the north and south sides by high walls, which impede the full circulation of air between Cable Street and Ratcliffe Street. Arrangements have been made by the

(1) Law Rep., 4 Q. B., 407. (2) Law Rep., 4 A. & E., 294.

vestry, with the sanction of the Metropolitan Board of Works, to purchase, out of funds secured or raised by parochial rates, the Wesleyan burial ground, with the view of laying it out and planting it as a garden for the use of the parishioners, with an entrance to it from Cable Street, and this court is asked to sanction a somewhat similar plan of planting and laying out this portion of the churchyard. The scheme involves the taking down of a portion of the high walls on the north and south sides of the churchyard, the removal of certain tombstones, which it is proposed to place against the wall of the churchyard, the fencing off of the old portion of the churchyard (with the exception of a narrow strip) by iron railings, and the continuance of the footpath from the Wesleyan burial ground, through the new portion of the churchyard to Ratcliffe Street.

The plan in question was unanimously approved of by a large meeting of the parishioners, convened by the rector and church-wardens *in March, 1875, on the under- [314 standing that it was not to involve the disinterment of any bodies or remains. This meeting led to a petition signed by 700 of the parishioners, including the principal rate-payers, being presented to the vestry, urging the vestry to take the steps requisite to carry out the scheme, and to a subsequent unanimous vote of the vestry in approval of it.

On principle and authority I entertain no doubt that it is not competent to this court to grant a faculty authorizing a churchyard to be appropriated as a public garden: *Reg.* v. *Twiss* (1). But the churchyard is under the control and protection of the court, and it is in the discretion of the court to authorize by a faculty the construction of footpaths in it for the convenience of the parishioners: *Walter* v. *Mountague* (2); the removal of high walls which obstruct the free circulation of air, the planting of it with trees and with flowers, as it is closed for burials; the erection of gates in order to give the parishioners access to it, and other minor alterations. In the exercise of this discretion the court is bound, in the words of Sir John Nicholl, "to exercise a sound discretion, having a due regard to times and circumstances and to the rights and interests of all parties concerned": *Butt* v. *Jones* (3). In the present case, the parties interested, the parishioners and the families of those who have been buried in this part of the churchyard, as far as the court can ascertain, without a dissentient voice, desire

(1) Law Rep., 4 Q. B., 407. (2) 1 Curt., 253, 261.
(3) 2 Hagg. Ecc. Rep., 417, 424.

that the parishioners should have free access to this portion of the churchyard during certain hours.

The court has jurisdiction to make an order which will give them such access, and if it makes it, it does not confer on the parishioners of St. George-in-the-East any greater right in regard to their churchyard than that which is enjoyed by the parishioners of very many country parishes, or even of very many town parishes in England. If it sanctions directly or indirectly the ground being planted with flowers, it will be doing nothing that can be construed as desecrating or altering the character of the place, or as offering any disrespect to the dead. Where tombstones are removed it will take care that the places of interment are so marked that the relatives or friends of those buried

315] *there will be able to distinguish the spot where they lie. The removal of the high walls that impede the free circulation of air between Cable Street and Ratcliffe Street will, according to the evidence of the rector and church-wardens, conduce greatly to the health of the neighborhood. The continuance of a footpath from Cable Street through the Wesleyan burial ground and the eastern portion of the churchyard to Ratcliffe Street will be a great convenience to many of the parishioners, saving them a circuitous route of about a quarter of a mile when going from Cable Street to Ratcliffe Highway; and it will have this further advantage—one which has great weight with the court in considering the application—that it will give many of the parishioners living in the north part of the parish a much shorter road to their parish church.

The church-wardens are prepared to undertake so to protect this ground as to preclude the occurrence of anything in it open to just exception; and it will still remain subject to the orders of this court, to which application can at any future time, if required, be made.

The court is prepared to issue a faculty to give access to the parishioners to this portion of the churchyard, and to make the other alterations indicated, and in granting it is satisfied that it is exercising a sound discretion, having due regard to the special circumstances of the case, and the interest of all parties concerned.

Any application relating to the details of the faculty may be made to me in Chambers.

Proctor for petitioners: *Clarkson.*

See 12 Eng. Rep., 656 note; 16 Am. Law Reg., N.S., 157 note; 19 Am. R., 79 note; Pierce *v.* Swan Point, etc., 14 Am. R., 667 note; Washington Cemetery *v.* Prospect Park and Coney Island R. R. Co., 7 Hun, 655.

The case of Rebecca Secord *v.* David Bell Secord, 31 Leg. Int., 268, referred to in the note, 16 Am. Law Reg., N.S., 162, was affirmed by the General Term of the Supreme Court of New York, at Poughkeepsie, June 12, 1871, Barnard, Gilbert and Tappen, Justices. We have a copy of the order in our possession which states that an opinion was written by Mr. Justice Hogeboom, who had probably sat at a former term when the case was argued. We are informed by a member of the bar that an abstract of Judge Hogeboom's opinion was published, about the time of the decision, in the New York Tribune, and that the abstract held that the widow, *as widow*, had the right to control the burial of her deceased husband. The opinion was stated to be very elaborate. It is greatly to be regretted that it has never been reported. As, however, the case at Special Term went upon the ground that after burial "a proper respect for the dead, a regard for the tender sensibilities of the living, and the due preservation of the public health, require that a corpse should not be disinterred or transported from place to place, except under extreme circumstances of exigency;" and from the statement of the facts of the case the question as to whether the widow or next of kin had the right to control the place of burial, would not seem to have arisen.

In the case of Lester et al., as next of kin, against Margaret Lester, widow, Samuel Lester died in October, 1868, leaving a widow and no child. He was buried in a country church graveyard. In 1870 his widow had bought a lot in a cemetery and proposed to remove the remains of her deceased husband to such lot. An action was brought by the brothers and sisters, as next of kin of deceased, to restrain the widow from removing the body, and a temporary injunction granted with an order to show cause why the injunction should not be continued until the termination of the action. On the return of the order Mr. Justice Bockes, of the New York Supreme Court, after hearing Messrs. Williams & Noble and A. D. Wait for the plaintiffs, and Messrs. Hughes & Northrop for the defendant, dissolved the injunction, holding orally that the widow, as widow, had the right to control the place of burial of her deceased husband where there were no children, but expressing no opinion as to the right as between widow and children. No written opinion was given.

After the proper interment of a body the control over it rests with the next of kin who is living. It cannot be transmitted or transferred.

Where there were several next of kin in the same degree, and they differed in their wishes as to the disposition of the remains, a bill by the majority to enjoin the others from interfering with the removal of the remains to another place, was dismissed.

When a body has been properly buried in a vault, with the consent of all concerned, quere whether even the next of kin can remove it against the will of the vault owner, though the latter be a stranger: Lowry *v.* Plitt, 16 Am. Law Reg., N.S., 155; 13 Upper Can. Law Jour., N.S., 112.

Replevin will not lie for a coffin and its contents, when those contents are a corpse. When a coffin, with the consent of all persons having a pecuniary interest in it, has been deposited in the earth for the purposes of interment, with a corpse inclosed within it, it is no longer an article of merchandise.

There is no property in a corpse; the relatives have, in regard to it, the right of interment; and this right having been once exercised by the father of a married woman, though against the husband's consent, or by the husband though against the consent of the father, no right to the corpse remains except to protect it from insult: Guthrie *v.* Weaver, 1 Missouri Appeal R., 136.

Cemeteries or graveyards will not be subjected to sale to satisfy liens on them for improvements of adjacent streets—especially when the disturbance of cemeteries or graveyards is made penal by statute: Louisville *v.* Nevin, 10 Bush (Ky.), 549, 19 Am. R., 78, 79 note.

An incorporated company was authorized to make by-laws, etc., to sell lots in fee simple or otherwise for sepulture alone, under such rules as the managers might ordain for the burial of the dead, etc. The by-laws provided that there should be no burial without a written permit from the sec-

retary, and that all transfers of lots must be registered in the office of the association. Boileau bought a lot, and his deed was registered; he conveyed it to Jones, a colored woman; this deed was not registered. She applied for a permit to bury her husband; the secretary declined because the lot was registered as Boileau's. Boileau asked for a permit to her to bury her husband in the lot; the managers then directed the secretary to refuse an approval of the transfer to Jones. The secretary refused to issue a permit for the burial. Held:

1. That Boileau had the right to bury the husband; that the refusal to issue the permit was arbitrary and unreasonable, and mandamus lay to compel the company to issue the permit.

2. When Boileau purchased, there being no restriction on his right of burial, the company could not afterwards abridge his rights: Mount Moriah, etc., *v.* Commonwealth, 81 Penn. St. R., 235, affirming 2 Weekly Notes of Cases, 244, cited 12 Eng. R., 665.

By their charter, a burial society consisted of such persons as might "be admitted members thereof and comply with the articles," etc. Each member should be entitled to one lot, to hold for a burial place, "to his heirs or assigns forever." Held:

1. That ownership of a lot was not equivalent to membership in the society.

2. Descent, devise or assignment of a lot did not necessarily carry with it the right to membership.

3. By resolution of the society, "any member, duly authorized by a family or owner of a lot, shall be entitled to vote," etc. This did not extend the right of membership: Com. *v.* Union, etc., 78 Penn. St. R., 308.

The first duty of an executor or administrator is to bury the deceased in a manner suitable to the estate, and the law will imply a promise on his part to pay a person who, upon the neglect of the executor, has performed this duty: Browne on Probate, citing Edwards *v.* Edwards, 2 Cromp. & Mees., 612, Reeves *v.* Ward, 2 Scott, 395.

As to what is suitable to the estate, see Browne on Probate, 207.

An administrator or executor is liable personally, and not in his representative capacity, for his contracts for the expenses of the funeral of the testator or intestate, and so of any contract made by him; a succeeding representative is not liable, as such, upon such contracts: 12 Eng. R., 666 note; Campbell *v.* Bell, 16 Grant's (U.C.) Chy., 115; Hardee *v.* Cheatham, 52 Miss., 41; Cocker *v.* Cocker, 2 Mo. App., 451.

But see Gilman *v.* Gilman, 63 N. Y., 41; Cardot *v.* Barney, 63 N. Y., 281; Ross *v.* Harden, 42 N. Y. Superior Ct. R., 427; Noyes *v.* Blakeman, 6 N. Y., 567; Stanton *v.* King, 8 Hun, 5; New *v.* Nicholl, 12 Hun, 431, reversed on this point but affirmed on another by Court of Appeals, March 19, 1878; Baring *v.* Putnam, 1 Holmes, 261; De Valengin's Adm'rs *v.* Duffy, 14 Peters, 283; McFarlin *v.* Stinson, 56 Geo., 396; Kyle *v.* Kyle, 67 N. Y., 400.

As to a trust to build, maintain, and keep in repair tombs, etc., see Neo *v.* Neo, 13 Eng. R., 207; Fellows *v.* Miner, 119 Mass., 541.

[1 Probate Division, 368.]

June 13, 1876.

368] *The Catterina Chiazzare. (S. 162.)

Damage—Lis alibi pendens—Court of Admiralty of Ireland—Stay of Proceedings—Dismissal of Action.

A collision occurred on the high seas between two vessels, the H. W. and the C. C., and to recover for the damage sustained therein the owner of the H. W. instituted a cause of damage *in rem* in the High Court of Admiralty of Ireland against the C. C., and caused her to be arrested in Ireland. The owners of the C. C. obtained the release of the vessel on bail, and instituted a cross suit against the H. W. Subsequently the C. C. came to England, and was there arrested in an Admiralty action

in rem at the suit of the owner of the H. W., who claimed in such action to recover damages in respect of the same collision. Whilst the proceedings in Ireland were still pending, the owners of the C. C. applied that the action in this court should be dismissed with costs:

The court ordered the vessel to be released, and all proceedings in the action to be stayed.

On the 19th of December last the Italian bark Catterina Chiazzare came into collision with the brigantine Harriett Williams, near Roches Point, in Ireland, and for the recovery of damage sustained in the collision, the owner of the Harriett Williams, on the 20th of December, instituted, in the High Court of Admiralty of Ireland, an action of damage *in rem* against the Catterina Chiazzare in the sum of £900.

The Catterina Chiazzare was arrested in this action by warrant, under the seal of the High Court of Ireland, on the 21st of December, at Cork, but, an appearance in the suit having been entered for the owner of the Catterina Chiazzare, and a bail bond given on his behalf, was, on the 31st of December, released from arrest. A cross action of damage *in rem* had, on the 23d of December, been instituted in the High Court of Admiralty of Ireland on behalf of the owner of the Catterina Chiazzare against the Harriett Williams. Subsequently, on the 26th of January, 1876, the owner of the Harriett Williams instituted an Admiralty action *in rem*, in the High Court of Justice in England, against the Catterina Chiazzare, in the sum of £1,000, and claimed to recover therein damages occasioned by a collision with the Catterina Chiazzare on the 19th of December, 1875, being the same collision in respect of which he had taken proceedings *in rem* in the High Court of Admiralty of Ireland as stated above.

*After being released from the arrest of the High [369 Court of Admiralty of Ireland, the Catterina Chiazzare sailed to Liverpool, and was, on the 27th of January, arrested at that port by the marshal of the High Court of Admiralty of England. Thereupon, on the 28th of February, an appearance under protest was entered in the action by the owner of the Catterina Chiazzare, and his solicitor filed in the London registry of the Admiralty Division a notice of motion, to the effect that the judge in court would be moved to dismiss the action and to condemn the plaintiff in costs.

In support of the motion an affidavit was filed, in which the solicitor in Ireland, for the owner of the Catterina Chiazzare, after a statement of the occurrence of the collision, the institution of a cause and cross cause of damage *in rem* in

the High Court of Admiralty of Ireland for the recovery of the damage arising therefrom, and the subsequent release of the Catterina Chiazzare from the arrest of that court on bail, further deposed, *inter alia*, as follows:—

"The aforesaid actions and cross action are still outstanding and pending in the said High Court of Admiralty of Ireland, and the owner of the Catterina Chiazzare is desirous that the procedings therein should be taken to judgment and conclusion in the said High Court of Admiralty of Ireland.

"The High Court of Admiralty of Ireland is a court of competent jurisdiction to hear and determine the said action and cross action. The owner of the Catterina Chiazzare is advised that in actions *in rem* brought between the same parties and for the same cause of action in two different courts, having co-ordinate jurisdiction, the court which has possession of the case when the second action is commenced, and has powers adequate to the administration of justice therein, is entitled to retain jurisdiction in the action first commenced.

"The High Court of Admiralty of Ireland has co-ordinate jurisdiction with the Admiralty Division of the High Court of Justice."

On behalf of the owner of the Harriett Williams an affidavit was brought in, which alleged that the solicitor in Ireland for the owner of the Catterina Chiazzare had applied to the judge of the High Court of Admiralty of Ireland to dismiss the principal cause of damage commenced in that court against the Catterina Chiazzare, but that the application had been refused; that the officials in the registry of the High Court of Admiralty of Ireland had declined to file a declaration of the non-prosecution of the said principal cause, and the consent of the owner of the Harriett Williams to the dismissal of the bail given therein; that the 370] owner of the *Harriett Williams was desirous that the action commenced in the Admiralty Division of the High Court of Justice in England should be tried out; that all possible means had been taken on his part for abandoning and putting an end to the action commenced by him in the Irish Admiralty Court, and that he was still willing that the same should be dismissed, and would pay the defendant's costs incurred therein.

R. E. Webster, on behalf of the defendant under protest, moved in accordance with the notice of motion: [He refer-

red to *The Lanarkshire* (1); *The Mali Ivo* (2); *Walsh* v. *Bishop of Lincoln* (3).]

E. C. Clarkson, on behalf of the plaintiff, submitted that although the court would stay proceedings in a case before it where it was proved that a plaintiff had elected to take proceedings in respect of the same cause of action in another court of competent jurisdiction, the same consequences ought not to follow where the court was asked to stay proceedings which the plaintiff had elected should be the only proceedings, and, so far as he had power to do so, had abandoned all proceedings elsewhere. [He also referred to *The Velocity* (4); *The Stork* (5); *The Orient* (6).]

R. E. Webster, in reply.

Cur. adv. vult.

April 4. SIR ROBERT PHILLIMORE: In this case an action has been entered on behalf of the owner of a vessel called the Harriett Williams. The facts of the case necessary for the court to state appear to be these: The Catterina Chiazzare is an Italian bark, and the owner resides at Genoa. The owner of the brigantine Harriett Williams resides in the city of Cork in Ireland. On the 19th of December of last year the two vessels came into collision near Roches Point, close to the harbor of Cork, in Ireland, and the owner of the Harriett Williams instituted a suit in the High Court of Admiralty of Ireland against the Catterina Chiazzare in the sum of £900.

A warrant under the seal of the Court of Admiralty of Ireland *was issued, and the Catterina Chiazzare was [371 arrested at Cork. An appearance was duly entered for her; and on the 24th of December a bail bond was entered into on behalf of her owners; and on the 31st of December the vessel was released by the High Court of Admiralty of Ireland, and proceeded to her final port of discharge—Liverpool. A cross action had been entered on the 23d of December in the High Court of Admiralty of Ireland on behalf of the Catterina Chiazzare against the Harriett Williams for the damages occasioned by the collision; and subsequently —some time, I think, in the month of February—the owner of the Harriett Williams, the plaintiff in the principal cause in the High Court of Admiralty of Ireland, gave notice to the owner of the Catterina Chiazzare that no further proceedings would be taken in this suit brought by them against

(1) 2 Spinks, 189.
(2) Law Rep., 2 A. & E., 356.
(3) Law Rep., 4 A. & E., 242.
(4) Law Rep., 3 P. C., 44.
(5) Not reported.
(6) Law Rep., 3 P. C., 696.

the vessel, and that the plaintiff would be at the costs which at that time had been incurred. Previously to this notice having been given, the Court in Ireland had already stated that it was not competent to the owner of the Harriett Williams to abandon the action until he had first caused the Catterina Chiazzare to be released in an action he had commenced against her in this court. Now the suit in this court was instituted on the 26th of January, and on the 28th of February an appearance under protest was entered on behalf of the owner of the Catterina Chiazzare. Now, the objection on protest is to the effect that there is a *lis alibi pendens* between these two vessels in the High Court of Admiralty of Ireland, that an application having been made to the judge in the High Court of Ireland to dismiss the suit on behalf of the original suitor, the owner of the Harriett Williams, that court refused to do so. Therefore the state of things is this, that there was a suit instituted in the High Court of Admiralty of Ireland by the same plaintiff who now institutes a suit in this court, there being also a cross suit in Ireland; and the judge having refused to dismiss the plaintiff on his application from the suit, it is contended that it is competent to me to meet the matter by dismissing the proceedings instituted in this court. I am of opinion that I ought not to allow this suit to be proceeded with at present.

I think that it has been clearly made out that there is a cause before the High Court of Admiralty of Ireland be-
372] tween the same *parties for the same object, and arising out of the same cause of action as the action before me, and that no doubt, apart from technical considerations, it would be a most inconvenient course of proceeding to allow the same case to be heard at the same time in two different courts. What I have to consider is, what other courts have decided as to what constitutes a *lis alibi pendens*. On this point I may refer to my decision in another court in *Walsh* v. *Bishop of Lincoln* (1). I think that the plaintiff here has lost his way. I think that he should have applied to the High Court of Admiralty of Ireland to dismiss the suit as he did, and if that was refused, I think he ought to have appealed from that refusal. At all events, in the present state of things, I shall order the Catterina Chiazzare to be released, and the proceedings in this court to be stayed. The question of costs will be reserved.

(1) Law Rep., 4 A. & E., 242.

June 13. *E. C. Clakson*, for the owner of the Catterina Chiazzare, moved the judge in court to dismiss the action without any order as to costs.

R. E. Webster, for the owner of the Harriett Williams.

His Lordship ordered the action to be dismised with costs.

Solicitors for plaintiff: *Pritchard & Sons.*
Solicitor for defendant, under protest: *Thomas Cooper.*

[1 Probate Division, 393.]

July 25, 1876.

*THE DELTA. (5885.) [393

THE ERMINIA FOSCOLO. (5971.)

Damage—Lis alibi pendens—Foreign Judgments by Default—Default for Want of Appearance—Default in Pleading.

The owners of the ship D. instituted proceedings in a foreign court against the owner of the ship E. in respect of a collision between the two ships. The owner of the E. instituted a cause of damage in this country in respect of the same collision against the ship D. The owner of the E. neglected to enter an appearance in the foreign court, but instituted a cross cause in the foreign court against the owners of the D. In both suits in the foreign court the owners of the D. obtained judgment by reason of the defaults of the owner of the E. The owners of the D., having appeared in the cause instituted in this country, pleaded the foreign judgments in bar. The court in this country, having decided on the merits in favor of the owner of the E., refused to give effect to the defence of *res judicata*.

THESE were causes of damage. The principal cause, No. 5,885, was instituted on behalf of the owners of the Italian bark Erminia Foscolo and the owners of her cargo against the French steamship Delta, the other, a cross cause, No. 5,971, was instituted on behalf of the owners of the Delta against the owner of the Erminia Foscolo.

The petition in the principal cause alleged in substance that on the 11th of August, 1871, the Erminia Foscolo was proceeding through the Straits of Gibraltar when the Delta approached and came into collision with her, doing her considerable damage, so that the Erminia Foscolo was in consequence afterwards compelled to take the assistance of the Delta, and to be towed by her to Gibraltar. That the collision had been occasioned by the negligent and improper navigation of the Delta.

The answer in the principal suit as amended at the hearing on *the 30th of July, 1874, commenced with [394 stating the circumstances in which, according to the case set up on behalf of the Delta, the collision had occurred, and after attributing blame to the Delta for improperly

deviating from her course before the collision, and denying the truth of all averments in the petition inconsistent with the circumstances stated in the answer alleged in substance as follows:—

6. said collision, and the damages and losses consequent thereupon, were caused by the negligent navigation of the Erminia Foscolo and those on board her. No blame is attributable to the Delta or those on board her in respect of the said collision.

7. The Erminia Foscolo, at the time of the said collision, was an Italian ship, and her owner was then, and always since has been, and now is, resident in Italy and an Italian subject.

8. In or about the month of September, 1871, the owner and master of the Erminia Foscolo commenced a suit against the company of the Messageries Maritimes, the owners of the said steamship Delta, and against the said steamship, in the Court of the Tribunal of Commerce at Marseilles, in the Republic of France, and prayed the said tribunal to declare the said owners of the Delta responsible for the consequences of the collision between the Erminia Foscolo and the Delta on the night of the 11th of August, as hereinfore mentioned, and to condemn the said defendants, the owners of the Delta, to pay to the said plaintiffs in the said suit the amount of their damages and costs.

9. In or about the said month of September, 1871, the master of the Delta and the said company, the owners of the said steamship, instituted proceedings against the master and owner of the Erminia Foscolo and the said bark in the said Tribunal of Commerce at Marseilles, and prayed the said tribunal to condemn the defendants in the said suit jointly and severally, the one as master and the other as owner of the Erminia Foscolo, to be civilly liable to pay to the said company the amount of the damage and losses occasioned to the Delta in the said collision between the Delta and the Erminia Foscolo, which had taken place in the Straits of Gibraltar, as hereinbefore mentioned, by the improper navigation of the captain of the Erminia Foscolo, together with costs.

10. At the time of the institution of the said respective suits and proceedings, and until and at the time of the judgments given in the same as hereinafter mentioned, the said Tribunal of Commerce was a court of competent jurisdiction to entertain the said suits and proceedings, and to adjudicate thereupon, and had jurisdiction over the said parties to the said suits and proceedings in and about the premises.

11. The master and owners of the Delta duly appeared as defendants in the suit brought against them by the said master and owner of the Erminia Foscolo in the said Tribunal of Commerce as aforesaid, and the said master and owner of the Erminia Foscolo appeared and defended the suit brought by the said master and owners of the Delta. Subsequently to such appearances proceedings were duly had and taken in the said suits before the said tribunal in accordance with the laws of France.

*12. After several adjournments, granted at the re- [395 quest of the master and owner of the Erminia Foscolo, the cause which they had brought against the said company of the Messageries Maritimes, the owners of the Delta, was definitely fixed for hearing by the said tribunal upon the 22d day of December, 1871. Upon the said 22d day of December, the said Tribunal of Commerce delivered judgment by default against the plaintiffs in the said suit, and rejected their claim against the said company, and dismissed the said company from the suit brought against them as aforesaid.

13. The cause brought by the owners of the Delta against the master and owner of the Erminia Foscolo was also appointed by the said Tribunal of Commerce to be heard upon the said 22d day of December; and upon the said day the plaintiffs in the said cause having proved their case to the satisfaction of the court, and the defendants in the said cause not appearing to contradict their evidence, the said Tribunal of Commerce delivered its judgment in the said cause, and condemned the master and owner of the Erminia Foscolo to pay to the said company the amount of the loss and damage sustained by the Delta by reason of the said collision, which was by the said judgment determined to have been occasioned by the improper navigation of the master of the Erminia Foscolo.

14. Notice of the said decrees of the said tribunal was duly given to the said owner and master of the said Erminia Foscolo in accordance with the requirements and provisions of the law of France, and all things on the plaintiffs' part have been done to make, and the said judgments have now by the law of France become and are valid, and conclusive, and final judgments, and binding upon the plaintiffs, and are still in full force and effect.

15. The defendants submit to this honorable court that by reason of the aforesaid judgments the plaintiffs ought not to be allowed to further prosecute this suit against the Delta.

The prayer of the answer was that the judge would pro-

nounce against the damage proceeded for, and dismissed the defendants and their bail from the suit with costs.

On behalf of the plaintiffs a reply was filed; such reply denied the truth of the several allegations contained in the 6th, 8th, 9th, 10th, 11th, 12th, 13th, and 14th articles of the answer, and those averments in the 1st, 2d, 3d and 4th articles of the same as were inconsistent with the allegations in the petition, and then (as ultimately amended) alleged in terms as follows:—

3*a*. The solicitor to the plaintiffs says that if any such suit as stated in the 8th article of the answer was brought in the names of the master and owner of the Erminia Foscolo, the bringing of such suit was never authorized or ratified by the plaintiffs, the owners of the cargo of the Erminia Foscolo.

4. He says that if any suit was commenced by the owner and master of the Erminia Foscolo as in the said 8th article alleged, it was commenced against the owners of the Delta only, and not against the Delta, and that it was subsequently and before the 22d of December, 1871, and before the 18th of November, the day of the institution of this suit, and before the 20th day of the same month, the day 396] *of the appearance of the defendants therein, abandoned by the master and owner of the Erminia Foscolo, and the judgment in the 12th article of the said answer stated was and is a judgment of nonsuit only, and not a judgment on the merits.

5. If any such judgment, as in the said 13th article alleged, was delivered by the said Tribunal of Commerce, it was delivered in default of appearance of the said master and owner of the Erminia Foscolo, and without any evidence previously given before the said tribunal, and was not, and is not, a judgment on the merits.

6. The said owner and master of the Erminia Foscolo, and the said owners of the cargo respectively, were not, nor was nor were either or any of them, at the time of the happening of the said collision, or at any time afterwards, subjects or a subject of France or resident or present therein.

7. The said owner and master of the Erminia Foscolo, and the said owners of the cargo respectively, had not any notice of the said alleged decrees within the time allowed by the law of France for an appeal therefrom respectively (1).

(1) Previous to the filing of this reply the solicitors for the plaintiffs gave notice that the court would be moved to reject the admission of articles 7 to 15 inclusive, of the answer in the principal suit, on the ground that articles 7 to 14 were inconsistent with, and did not support, the submission contained in the 15th article. This motion, however, by consent stood over until the hearing.

The solicitors for the owners of the Delta delivered the following amended rejoinder:—

1. As to article 3*a* of the amended reply of the plaintiffs, the owners of the cargo of the Erminia Foscolo authorized and ratified the said suit.

1*a*. By the laws of France, apart from any express authority or ratification, the plaintiffs, the owners of the cargo of the Erminia Foscolo are, under the circumstances, bound and estopped by the said judgment; and the defendants submit that the law of France is the law applicable to this case.

1*b*. As to the 4th article of the reply, the solicitors for the defendants deny that at any time before the said 22d of December, 1871, the said owner and master of the Erminia Foscolo abandoned the said proceedings and suits instituted by them in the said Tribunal of Commerce at Marseilles; and they say that the said judgment was final and conclusive, and not a judgment of nonsuit as therein alleged.

2. They deny the allegations contained in the 5th and 7th articles of the said reply.

3. They submit that the allegations contained in the 6th article of the reply are immaterial under the circumstances set forth in the 8th article of the answer.

4. By the law of the kingdom of Italy, and by treaties between France and Italy, heretofore and now existing and in force, and particularly by the treaty between the said countries of the 24th day of March, 1760, it is provided that the Supreme Courts of Italy should be guided by letters of request of the Supreme *Courts of France in giving [397 executory force and effect within the said kingdom of Italy to the sentences and judgments of the courts of France according to law.

5. On the 12th day of February, 1872, the defendants in this suit duly obtained from the Court of Appeal at Aix, in the republic of France, being a Supreme Court of France within the meaning of the said laws and treaties, a letter of request addressed to the Court of Appeal at Genoa, in the said kingdom of Italy, requiring executory force and execution within the said kingdom to be given to the sentences and judgments of the said Tribunal of Commerce at Marseilles alleged in the 12th and 13th articles of the said answer, and the said owner and master of the Erminia Foscolo were duly cited to appear before the said Court of Appeal of Genoa to answer to the prayer and request that executory force should be given to the said judgments as aforesaid; the said owner of the Er-

minia Foscolo appeared and opposed the said prayer and request.

6. On the 4th of June, 1872, the said Court of Appeal of Genoa, being a Supreme Court of Italy within the meaning of the said laws and treaties, after hearing the pleadings and exceptions of the said owner of the Erminia Foscolo, in opposition and contrary thereto, rejected every exception and petition of the said owner of the Erminia Foscolo, and decreed and declared that executory force must be and thereby was given to the said sentences and judgments delivered by the Tribunal of Commerce of Marseilles in the suits respectively brought by the defendants and the owner and master of the Erminia Foscolo, as set forth in the answer filed herein, and declared the said judgment to be executory within the said kingdom of Italy.

7. The said judgment of the said Tribunal of Commerce of Marseilles set forth in the 12th and 13th articles of the said answer, and the said judgment of the Court of Appeal at Genoa are, by reason of the premises, valid and binding and conclusive upon the plaintiffs in Italy as well as in France; and by the law of Italy as well as by the law of France the plaintiffs are precluded from recovering any damages from the defendants in respect of the collision alleged in the petition.

8. The defendants repeat the submission contained in the 15th article of the answer.

An amended conclusion was filed by the solicitor for the plaintiffs, denying the truth of the allegations in the rejoinder, and alleging that the same was bad in substance.

The petition and answer in the cross cause were filed under date of the 1st and 21st of February, 1872, respectively. It is, however, unnecessary to set them forth here, as they only contained allegations material to the merits of the collision and the liability of the owner and master of the Erminia Foscolo by reason of the negligent navigation of their vessel.

July 30, 1874. The principal and cross causes came on to be heard together before the judge assisted by two of the Elder Brethren of the Trinity Corporation.

398] **Milward*, Q.C., and *E. C. Clarkson*, appeared for the owners of the Erminia Foscolo and the owners of the cargo.

The Admiralty Advocate (*Dr. Deane*, Q.C.) and *R. E. Webster*, for the owners of the Delta.

The evidence for the plaintiffs and defendant relating to the merits of the case, which had previously been taken

orally before examiners of the court, was brought in, and it was agreed that the witnesses for the Delta should be first examined upon the question of law. The counsel for the owners thereupon put in the proceedings of the Tribunal of Commerce at Marseilles (1) and produced and examined as a witness M. Auguste Matthieu of the French bar, who gave evidence as to the nature and effect of the judgments of the Tribunal of Commerce at Marseilles pleaded in the answer in suit No. 5,885. During the examination of the witness a question arose as to the amendment of the pleadings, and the court gave leave to the parties to amend for the purpose of raising the issue whether the judgments of the French court were not binding and conclusive as an estoppel against the owners of the cargo of the Erminia Foscolo as well as the owners of that ship.

The question of law was then adjourned for further hearing, but the Elder Brethren of the Trinity Corporation being in attendance, the court considered it advisable, with the consent of the parties, to proceed to the trial of the case upon the merits. After hearing the caunsel on both sides the court pronounced (*de bene esse*) that the Delta was alone to blame for the collision.

July 10, 1876. The pleadings having been amended, the reserved question of law came on for further hearing, and such hearing was continued on the 11th of July.

The examination of M. Matthieu was continued, and further evidence with respect to the nature and effect of the proceedings in the French and Italian courts, both so far as the owners of the Erminia Foscolo and the owners of the cargo were concerned, was *given by French and [399 Italian advocates, who referred to the following authorities as containing the French and Italian law on the subject: French Civil Code, Art. 14; French Code of Civil Procedure, Arts. 135, 150, 155, 156, 157, 159, 434, 469; French Commercial Code, Arts. 435, 436, 643; Dalloz Jurisprudence Générale, 1868, Part II, p. 10; Treaty of the 24th of March, 1760, between France and Sardinia (2); Treaty of the 11th of September, 1860, as to the interpretation of paragraph 3 of

(1) By certificates which formed part of such proceedings, it appeared that copies of the citation of the master and owner of the Erminia Foscolo on the 9th of September, 1871, at the suit of the owners of the Delta, and copies of the judgments of the 22d of December, 1871, had been left for the master and owner of the Erminia Foscolo respectively at the office of the Procureur of the French Republic at Marseilles.

(2) "Traité entre le Roi de France, Louis XV, et le Roi de Sardaigne, Charles Emanuel, conclu a Turin, pour regler les limites de leurs Etats;" see Wencker Codex Juris Gentium recentissimi, vol. iii, p. 218. Leipsic, 1795, where the treaty is given *in extenso*, and De Clerq Recueil des Traités de la France, tom. i, p. 80.

Article 22 of the first mentioned treaty (1) (2); Italian Code of Civil Procedure, Art. 10; Italian Commercial Code, Arts. 536, 537, 566.

The proceedings in the court of Genoa were proved in evidence, together with a certificate from an officer of the Tribunal of Commerce at Marseilles that, up to the date when such certificate was drawn up, 23d of July, 1874, there had been no steps taken to oppose the judgments delivered on the 22d of December, 1871, in favor of the owners of the Delta. The owner of the Erminia Foscolo and the manager of the London firm who were the owners of the cargo of the Erminia Foscolo were examined, and the latter stated that the owners of the cargo of the Erminia Foscolo had never sanctioned or ratified the proceedings commenced by the owner of the Erminia Foscolo before the Tribunal of Commerce at Marseilles, and, in fact, at the time had no notice at all that any such proceeding had been taken.

From the evidence of another witness produced on behalf of the plaintiffs it appeared that the judgments of the Tribunal of Commerce at Marseilles in favor of the owners of the Delta had not been satisfied.

Milward, Q.C., and *E. C. Clarkson*, argued for the owner of the Erminia Foscolo and the owners of her cargo: The judgments of the French Tribunal of Commerce at Mar-
400] seilles and the subsequent *proceedings in Italy can work no estoppel in this case, for there has been no judgment either in the French or Italian court disposing of the merits of the case; the decision of a foreign court by default cannot in such circumstances as exist in the present case be treated as final and conclusive. At the time of the institution of the suit against the Delta in this country the judgments in the French court had not been delivered, and therefore the defendants, in order to succeed on the plea of *res judicata*, must contend that an estoppel could come into existence during the progress of the proceedings here; such a proposition is untenable. In fact the owners of the Delta ought to have taken a similar course to that pursued in the case of *The Mali Ivo* (3), and have pleaded the pendency of the suits abroad. The court then in its discretion might have put the plaintiffs to their election which set of proceedings they would proceed with, the proceedings in this court

(1) "Déclaration échangée à Turin le 11 Septembre, 1860, entre la France et la Sardaigne pour l'exécution réciproque des decrets et jugements des cours superieurs;" see De Clerq Recueil des Traités de la France, vol. viii, p. 118.

(2) Copies of these treaties, authenticated under the provisions of 14 & 15 Vict. c. 99, s. 7, were put in as evidence.

(3) Law Rep., 2 A. & E., 356.

or the proceedings abroad. As this course has not been taken, it is clear that the court can examine into the judgments delivered at Marseilles: *Don* v. *Lippman* (1), and ought not to disregard the fact that such judgments have up to this time remained unexecuted. It cannot be said here that the same matter or cause of action has already been finally adjudicated on between the parties by a court of competent jurisdiction, that is, that the same identical matter has come in question already in a court of competent jurisdiction, and has been there controverted and finally decided: *Langmead* v. *Maple* (2).

The Admiralty Advocate (Dr. *Deane*, Q.C.) and *R. E. Webster*, for the owners of the Delta: It does not concern the court to inquire whether the foreign judgments relied on by the defendants, the owners of the Delta, were by default or on the merits. The only question is, has there been a *res judicata?* that is, has there been on the matter in question in the principal suit here a decision of a competent court, to whose jurisdiction the same persons as are before the court here were subject? This question must be answered in the affirmative. The master and owner of the Erminia Foscolo, by instituting in France the suit they afterwards abandoned, selected the French court as a tribunal having jurisdiction *over them; they are clearly [401 therefore bound by the proceedings there. On this point the case of *Schibsby* v. *Westenholz* (3) is an authority. In the judgment in that case the following passage occurs: "Again, we think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him" (4). No doubt, the judgment of a foreign court cannot in some cases be enforced against a non-resident foreigner, because there is no duty imposed on such foreigner to obey the judgment. But the case is different where, as here, persons have agreed to be bound by the decision of a foreign court, or have voluntarily appealed to it for the protection of their interests. [They referred to *Copin* v. *Adamson* (5), *Tarleton* v. *Tarleton* (6), and *Vallee* v. *Dumergue* (7).] The owners of the Delta, though they might have applied to have the proceedings here dismissed on the ground of there being a *lis alibi pendens*, were not bound to do so. The French judgments were pleaded as soon as

(1) 5 Cl. & F., 1.
(2) 18 C. B. (N.S.), 255, 270.
(3) Law Rep., 6 Q. B., 155.
(4) Law Rep., 6 Q. B., at p. 161.
(5) Law Rep., 9 Ex., 345; 1 Ex. D., 17.
(6) 4 M. & S., 20.
(7) 4 Ex., 290; 18 L. J. (Ex.), 398.

possible after they were delivered, and if, as we contend, they are final and conclusive and a peremptory bar to the suits here: (Digest, p. 44, title 1, 2; Story's Conflict of Law, sec. 598; Westlake's Private International Law, p. 376; Marten's Précis du Droit des Gens, edited by Vergé, t. 1, l. 3, sec. 94; *General Steam Navigation Co.* v. *Guillou* (1)); the court will not reject the plea of *res judicata* merely on the ground that it was pleaded too late. With regard to the effect of the judgments in the French court, it must not be forgotten that although the judgment in the suit brought by the owners of the Delta at Marseilles was a judgment rendered for want of appearance, yet to some extent at least the court would seem to have take into consideration the merits of the case.

Milward, Q.C., replied.

Cur. adv. vult.

July 25, 1875. SIR ROBERT PHILLIMORE: These are cross causes of collision brought originally in the High Court of 402] *Admiralty: the first by the owner of the bark Erminia Foscolo and the owners of her cargo against the steamship Delta; the second by the owners of the Delta against the Erminia Foscolo. In the suit against the Delta the pleadings, besides narrating in ordinary form the incidents of the collision, raise a further issue or further issues in the following manner. Articles 7 to 15 inclusive of the answer as amended are as follows: [His Lordship here read the last nine paragraphs of the amended answer in the principal cause.] To this articles 3 to 7 inclusive of the reply are as follows: [His Lordship here read the last five articles of the amended reply in the same cause.] And the rejoinder is as follows: [His Lordship here read the rejoinder above set out.] The pleadings in the suit against the Erminia Foscolo merely raise the issue as to the blameworthiness of the two vessels. When the cases came on for hearing, by arrangement, this last question was determined first; and on the merits I have found the Delta alone to blame for the collision.

The point, however, remains, on which evidence of foreign jurists and others has been since taken, and which was finally argued on the 10th of this month, whether the questions in dispute between the parties had not previously been determined by another competent court, so that the matter was in the category of one of *res judicata*.

The collision occurred on the 11th of August, 1871, off Gibraltar. On the 9th of September, 1871, the captain and

(1) 2 M. & W., 877.

owners of the Delta instituted a suit in the Court of Commerce at Marseilles against the captain and owner of the Erminia Foscolo. On the 12th of September a suit was instituted in the same court by the owner of the Erminia Foscolo against the owners of the Delta. Some adjournments of the two suits were had; and on the 22d of December the tribunal, in the suit brought against the captain and owner of the Erminia Foscolo, pronounced judgment against the defendants for default of appearance, condemning them in the plaintiff's damages and costs. On the same day the tribunal, in the suit brought against the owners of the Delta, pronounced judgment against the plaintiff for default of prosecution, condemning him in costs.

By a treaty of 1760 between France and the kingdom of *Sardinia, the supreme commercial courts of either [403 country were to execute the decrees of each other.

A petition was presented by the owners of the Delta to the Court of Appeal at Aix praying that court to put in force the provisions of this treaty by sending letters of request—réquisitoires lettres rogatoires—to the Court of Appeal at Genoa, and such letters were accordingly decreed by the Court at Aix on the 12th of February, 1872.

On the 24th of February a citation out of the Court at Genoa was served on the owner of the Erminia Foscolo; a further citation seems to have been served on the 12th of March; and on the 4th of June, the Court at Genoa having heard argument on both sides, decreed that executive force must be given to the judgments of the Court of Commerce, and condemned the owner of the Erminia Foscolo in costs. Some attempt seems to have been then made to execute these judgments, but ultimately they remained unexecuted. In the meantime the suits in the High Court of Admiralty had already been instituted. That against the Delta was instituted on the 18th of November, 1871, and an appearance was entered for the owners of the Delta on the 20th, that appearance being not under protest, but absolute. The suit against the Erminia Foscolo was instituted on the 13th of January, 1872, and an appearance was entered on the same day. The judgments in the Court of Commerce were not given until the 22d of December, 1871; so that at the time of the institution of the suit here against the Delta, and of the appearance of the owners of the Delta, the suit in the Court of Commerce had not passed into a *res judicata*, but was only a *lis alibi pendens*.

Even after the judgment in the Court of Commerce the owners of the Delta instituted their suit here against the

Erminia Foscolo, and filed pleadings in that suit in which no mention is made of the judgment of the Court of Commerce.

On the questions of foreign law both French and Italian advocates were examined. Their evidence left it at least doubtful whether the judgments of the Court of Commerce, given as they were in default of appearance or prosecution, and never having been executed, would now have in France or Italy the force of *res judicata*.

404] *But I think it unnecessary to go into their evidence in detail, as I am of opinion this defence must fail, for two reasons: the first is that at the time when the suit against the Delta was begun there was confessedly no *res judicata;* there was only a *lis alibi pendens;* and if the owners of the Delta had wished to escape from having two suits against them for the same matter brought to a hearing, they should have put the owners of the Erminia Foscolo to their election, compelling them to abandon one or the other of the suits, according to the rule laid down by me in *The Mali Ivo* (1), and quite recently applied in the *Catterina Chiazzare* (2).

As regards the suit against the Erminia Foscolo, that was brought by the owners of the Delta while the foreign *lis* was pending; they cannot be heard, therefore, to object that that *lis* is a bar to a decision on the merits in this suit.

The second reason is that the foreign judgments not having been given on the merits of the case, but on matters of form only, cannot be set up as a bar to a decision on the merits. It is, however, upon the former ground that this judgment is principally founded. I have already pronounced the Delta to be alone to blame for the collision. I must now pronounce that the further defence raised on behalf of the owners of the Delta is not sustained, and that they must be condemned in the damages occasioned by the collision, and in the costs of the suit; and I must dismiss the suit against the Erminia Foscolo with costs (3).

Solicitor for owners of the Erminia Foscolo and owners of her cargo: *Cooper*.

Solicitors for owners of the Delta: *Gellatly, Son & Warton.*

(1) Law Rep., 2 A. & E., 356. (2) *Ante, p.* 368.
(3) See *Meyer* v. *Ralli*, 1 C. P. D., 358.

[1 Probate Division, 405.]

Aug. 2, 1876.

*W., falsely called R., v. R. [405

Suit for Nullity—Impotence—Delay—Insincerity of Complaint.

In August, 1875, a wife, then aged 47, instituted a suit for a declaration of the nullity of a marriage contracted in May, 1849. There was evidence that the petitioner was *virgo intacta*, and that the respondent was incurably impotent. The petition was dismissed, the court being of opinion that there was no satisfactory explanation of the delay in taking proceedings, and that the proceedings had been taken partly in consequence of the disagreements and quarrels between the petitioner and the respondent, and not with the single object of obtaining redress for the injury done to petitioner by the respondent's incapacity.

THIS was a wife's petition for a decree of nullity by reason of the husband's impotence. The husband had entered an appearance, but had filed no answer. The facts are fully stated in the judgment. The cause was heard on the 7th and 13th of July, 1876.

Bayford, for the petitioner: If the court is satisfied that the marriage has never been consummated, and that the non-consummation is owing to the incurable incapacity of the husband, and that the petitioner is sincere in her desire to obtain relief, she is entitled to a decree, whatever may be the age of the parties at the time of taking proceedings. Mere delay is no bar to the suit.

[The following authorities were cited: Ayliffe's Parergon, p. 227; Bishop on Marriage and Divorce, bk. iii, c. 6; *B.* v. *B.* (1); *A.* v. *B.* (2); *G.* v. *T.* (3); *H.* v. *C.* (4); *M.* v. *B.* (5); *M.* v. *C.* (6); *Pollard* v. *Wybourn* (7); *L.* v. *H.* (8).

Cur. adv. vult.

Aug. 2. SIR ROBERT PHILLIMORE: This is a suit for nullity of marriage by reason of the incurable mal-conformation and consequent *impotence of the husband [406 at the time when the marriage was contracted.

The petition in this case was filed on the 12th of August, 1875. The marriage was celebrated on the 13th of May, 1849. The suit was instituted, therefore, after a lapse of more than twenty-six years. The parties were in the middle class of life, the husband being a journeyman hairdresser,

(1) 1 Adm. & Eccl., 248.
(2) Law Rep., 1 P. & M., 559.
(3) 3 Sw. & Tr., 312; 33 L. J. (P. M. & A.), 37.
(4) 1 Sw. & Tr., 605; on appeal, 9 H. L. C., 186; 31 L. J. (P. M. & A.), 103.
(5) 3 Sw. & Tr., 550; 33 L. J. (P. M. & A.), 203.
(6) Law Rep., 2 P. & M., 414; on appeal, Law Rep., 2 H. L., Sc., 300.
(7) 1 Hagg. Eccl., 725.
(8) 4 Sw. & Tr., 115; reported as *X.* v. *Y.*, 34 L. J. (P. M. & A.), 81.

and the wife had some little property of her own, producing an income of about £26 a year. She is rather more than forty-seven years old. The husband has appeared in the suit, but not answered. The examination of the husband's person by physicians appointed by the court proves his incapacity to be incurable, and the wife is reported by them to be *virgo intacta*. The other principal facts are these: The husband made an attempt to consummate the marriage on the first night of their cohabitation. It was unsuccessful. This was not repeated till after a long interval, and only on two occasions. They cohabited together at Stourbridge for a year and nine months. The wife has been examined—the only witness except the medical men. She says that she spoke to him about his physical condition; he said he was "sensitive, delicate, not like other men." After a year and nine months they separated, the wife says, "because he ill-treated me, and because we did not live comfortable." The wife went to her uncle and aunt, who kept a clothes shop, I think, near Stourbridge. There the wife resided no less a time than nine years; and she says, and it is remarkable, that she never mentioned to her uncle and aunt any other reason for leaving her husband than that he had thrown a candlestick at her. During all this long period she had never mentioned to her aunt—a married woman—that her husband had never consummated the marriage. In consequence of a letter from her husband, promising to be a good husband to her if she would return, she did return to him after a lapse of nine years, and stayed with him five years and six months. One other attempt only at consummation was made. They quarrelled, she says; he ill-treated her, had a violent temper, pushed her down; she determined to leave him on account, she said, "of his ill-treatement, and the other reason as well." In 1865 she packed up her clothes and things in a bundle; he took it from her; she 407] went *nevertheless to her uncle and aunt, and never returned to her husband. She told her aunt that she had left her husband because he had taken her things. It appears to have been at Christmas, 1865, that she went back to her uncle's house. He died in August, 1866. Her aunt died in 1869. Before her death in that year the petitioner mentioned for the first time to her aunt the non-consummation of her marriage in the presence, it should seem, of Mr. Humphrey, a solicitor. Her aunt said "she would see her righted if she lived." And something seems to have been said about legal proceedings. None were taken, however, and the petitioner went to live in Hogley Road, and there

remained till 1875. She says that in March of that year she heard accidentally from a friend of a case similar to her own in which legal proceedings had been taken, and then "the light flashed upon her mind" that she might be free, and in August she filed her petition.

She was not a satisfactory witness, deposing with hesitation and uncertainty to the facts which I have stated; but I have no doubt from the answers which she made to me that but for the quarrel with her husband, the disagreement of their tempers, and the uncomfortable life which they led in consequence, she would not have brought this suit.

I do not believe that if she had had any serious sense of an injury done to her by the incapacity of her husband she would for so many years have altogether abstained from mentioning the subject to her married aunt, who appears to have been in the relation of a mother to her, and to whom it is remarkable that she gave another and different reason for leaving her husband's house.

Now the law which governs these cases is peculiar. The marriage is not void, but voidable by a judicial sentence. The contract of marriage differs generally, and in some respects materially from other contracts. It cannot be dissolved at the pleasure of the parties, nor can it be annulled at any period of the married life even when one of the parties by a physical incapacity has been unable to perform some of the duties incident to it. For instance, could it be maintained that either husband or wife could at the age of eighty set aside their marriage on the ground that one of the two parties had, sixty years ago, been visited with *an [408 affliction of mal-conformation? The law would surely hold that the complaint was, according to Lord Stowell's expression, "insincere," that the party complaining had made his or her election to abide by the contract, and would apply the canonist's maxim "*Habeat tanquam soror vel tanquam frater.*" The law would be very inhuman if it allowed the husband after a long cohabitation, without any satisfactory explanation of the delay, to throw his wife in her middle or old age, with ignominy, shame, and poverty, upon the world because she had been originally, however innocently, by physical causes incapacitated from performing some of the duties of the married state. The law, therefore, has always required sincerity in the complainer, that is, a real sense of the grievance complained of unmixed with any other subsidiary motive, and, as a necessary proof of such sincerity, has also required all reasonable promptitude to be exhibited by the complainer in seeking legal redress. Per-

haps there is no state of things to which the maxim, *Vigilantibus non dormientibus subveniunt leges*, is more directly applicable. This exposition of the law will be found in many reported cases. In none perhaps is it more clearly laid down than by the Privy Council in a case in which that most experienced ecclesiastical judge, Dr. Lushington, delivered the sentence. In *B.* v. *B.* (1), Dr. Lushington said: "Their Lordships are of opinion that cases might occur where long acquiescence with knowledge, or the means of procuring knowledge, would operate as a bar to the prosecution of such a suit, and more especially if the circumstances showed that the suit was brought, not on account of the evils resulting from such imperfection, but for other and different reasons. The authorities with regard to lapse of time, and the effects thereof, are few, and these suits, till of recent years, have been so rare that it was highly improbable that much could be found on this head. As might be expected, these authorities do not specify any particular lapse of time since the marriage as forming a bar to the institution of a suit of nullity, and for very obvious reasons. In almost every case falling within this category the circumstances differ; in some cases the delay may be satisfactorily accounted for, though apparently of long duration, 409] in *others, though the lapse of time may have been of briefer duration no reasonable cause for not commencing the suit earlier may appear. The result of all the cases about to be cited will show that great delay in the institution of a suit of this description by the husband has always been considered an objection to be accounted for. In the case of *Guest* v. *Guest* (2) Lord Stowell thus expressed his opinion: 'The length of time which has elapsed is in itself almost a bar, for I do not remember any instance in which such a suit has been allowed to be instituted after such an interval. That a period of seven years should be allowed to elapse in a case where even a very short cohabitation would have sufficed for the discovery, is not allowed by any principle of law with which I am acquainted.' It is true that in that case Lord Stowell held the suit to be barred on another and a totally different ground, namely, that in a previous suit brought by the wife for separation on account of adultery, the husband had admitted the marriage,—still though not a decision, it is the expression of an opinion from the highest authority, and is justly entitled to great weight. Again, in the case of *Briggs* v. *Morgan* (3), Lord Stowell, though the case was not decided on that ground,

(1) 1 Eccl. & Adm., at p. 261. (2) 2 Hagg. Cons., 323. (3) 2 Hagg. Cons., 329.

declared his opinion that a delay of even sixteen months unaccounted for was a proof of insincerity.

"From the passage above cited, it appears that it was clearly the opinion of that eminent judge, that delay in the commencement of a suit of this description required to be accounted for, and might, with other circumstances, constitute a bar. In these cases the court abstained from giving any opinion as to the mere lapse of time, but held it to be an important ingredient.

"The inquiry, therefore, in the present case will be whether the lapse of time is accompanied with other facts which prove, to use Lord Stowell's expression, the insincerity of the suit, or in other words, that whatever may be the defect of the wife, it was not a grievance to the husband or the real cause why the suit was brought."

In 1861, in *Castleden* v. *Castleden* (1) Lord Chancellor Campbell gave a judgment in the House of Lords, in a case of nullity, *founded on the principle that lapse of [410 time coupled with an indirect motive, was of itself an absolute bar.

In a judgment delivered in 1872 in *M., falsely called C.*, v. *C.* (2), Lord Penzance said, "She (the wife) had, if her story is trustworthy, for two years at least, known of her husband's impotency, and had resented it, and yet, so far as appears in evidence, to no member of her family or friend did she then make any allusion to the wrong from which she now alleges she had all along suffered. She might not indeed have been aware of the possibility of such a suit as this, but it is hardly credible that this wrong if it existed should not, at least to her female relations, have found utterance at such a time, and have been included among the grievances which she then laid to her husband's charge. In the face of this conduct on her part, bearing in mind that the oath of the respondent is set against hers throughout, and that the *onus* of proof lies upon her, I cannot judicially hold that she has established the facts upon which she claims relief. But if she had, some impediments would still remain. Relief in suits of this nature is never accorded by the court unless the petitioner be prompt in seeking it and sincere in the motive for doing so. I cannot hesitate to say that if the petitioner was, as she alleges, made cognizant within four or five years after her marriage of her husband's impotency, she could not have delayed these proceedings for three years more without being open to the charge of want of sincerity or promptitude. In saying this I am not

(1) 9 H. L. C., at p. 191. (2) Law Rep., 2 P. & M., 414.

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forgetful of the fact that she may not have known that such a suit as this could be entertained. But the requirements of promptitude could never be enforced by this court if it were first necessary to prove the existence of such knowledge. The general circumstances of each case and the facilities of the parties aggrieved for obtaining legal advice and assistance will vary indefinitely, but the conditions to which I have alluded mean nothing if they do not mean this—that the petitioner is bound to have evinced impatience under a sense of wrong and a reasonable activity in complaint and redress. The court cannot recognize these features in the conduct of the petitioner. On the contrary, she appears to have lived contentedly enough with her hus-
411] band, until, as she says, he ill-treated her; and *if Mrs. M.'s impression was correct, she was more moved to the institution of this suit when she first found that it was open to her by the prospect of getting quit of the burthen of supporting the respondent than by anything else."

In the case before me the wife has been married more than twenty-seven years, and is in her forty-eighth year, an age when neither the procreation of children nor the gratification of the passions,—two of the various ends of marriage which usually lead to the institution of these suits,—can reasonably be expected. The delay is much longer than any I believe which has hitherto occurred in these causes, and it is not satisfactorily accounted for. The wife does not, in my opinion, bring the suit for the single object of redress on account of the impotency of her husband, but for another reason also.

Upon all these grounds, I refuse to grant the prayer of the wife, and dismiss the husband from the suit.

Solicitor for petitioner: *E. Byrne.*

[1 Probate Division, 411.]

May 3, 1876.

[IN THE COURT OF APPEAL.]

THE LIMERICK. (7318.) (1).

Bond—Collision—Liability of Master—Disbursements—24 Vict. c. 10, s. 10.

The master of a vessel which, by his default, had been in collision with another vessel in a foreign port, gave a bond for payment of the damages, and so released the vessel:

Held, in an action for wages and disbursements brought by the master, that as against the mortgagees of the vessel the amount of the penalty of the bond would not be retained in court to meet any claim which might be established against the master under his bond.

(1) Reversing in part, *ante*, p. 418.

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THIS was a cause of wages and disbursements carried on on behalf of the master of the steamship Limerick against the vessel, and against C. J. Jutson, an alleged mortgagee of the vessel, intervening as defendant.

The plaintiff claimed to recover in the action, *inter alia*: 1. A sum of £200, being the amount of the penalty of a bond given by *him to release the vessel from deten- [412 tion on account of a collision between the Limerick and a vessel called the Skitty Belle, which occurred in a foreign river, the collision being apparently caused by default of the master. 2. A sum of £102 0*s.* 2*d.* for which, as he alleged, he was liable to Messrs. Dowson & Worth, ship-brokers, on a bill for repairs to the vessel.

Sir R. Phillimore, judge of the Admiralty Division, made an order to the effect that the plaintiff was entitled to have retained in court the sum of £200, to meet any liability under his bond, and to receive the £102 0*s.* 2*d.* as part of a larger sum payable to him for disbursements on account of the ship, as reported, *ante*, p. 292, where the facts are fully stated.

The defendant appealed.

E. C. Clarkson, for the defendant: The claim for disbursements is a creature of the Act of 1861 (24 Vict. c. 10, s. 10), and the master must show that he comes under its provisions. As to the bond, the master has, in fact, admitted that the damage was occasioned by his own fault, and he will therefore be liable to his owners if they are compelled to pay, and he is liable to the owners of the foreign ship: he cannot be put in a better position because he gave the bond.

Watkin Williams, Q.C., and *W. G. F. Phillimore*, for the plaintiff: As to the £200, the owner may be liable and the master not liable in cases of collision. There is no evidence that he would be liable over again to the owners. They may have sent him to a dangerous place, and have ordered him to run the risk; or the mate may have been in charge. The owners would never have attempted to recover from the master the damages they might have to pay.

JAMES, L.J.: As to the allowance of £102 0*s.* 2*d.* for repairs, the judge of the Admiralty Division came, in my opinion, to a right conclusion, and that part of his order must stand. The plaintiff is liable to Dowson & Worth if the debt was contracted under such circumstances as would enable them to elect whom they would sue, the owners or the master, and, in my opinion, it was so contracted.

*As to the other point, it appears on the evidence, [413

and from the statement of the captain, and on the face of the bond, that he was a wrongdoer, and he cannot on any reasonable principle charge as a disbursement against his principal money which he may have to pay by reason of his own wrongdoing; he did the mischief, and if he has to pay the money under the bond, he could not recover it against his principal as a disbursement.

BAGGALLAY, J.A.: I am of the same opinion.

LUSH, J.: I also am of the same opinion. As to the first point, I agree with my Lords. As to the second point, it was contended that giving the bond was the best thing the master could do for the owners. I agree that having done the wrong, he was bound to do his best at any sacrifice, and though in this sense it was the best thing for the owners, he has not thereby acquired any right to charge the owners for money paid in respect of any liability incurred through his own wrongdoing. Had there been any doubt about it, he would have been re-examined on the point, but it is clear that the accident happened through his own default, and the money cannot be retained.

Order affirmed as to the debt; reversed as to the bond.

Solicitors for plaintiff: *Lowless & Co.*
Solicitors for defendant: *Linklater & Co.*

[1 Probate Division, 414.]

July 22, 1875.

414] *THE PETER DER GROSSE. (6972.)

Damage to Cargo—Onus of Proof—Bill of Lading—Weight, Contents, and Value unknown.

The master of a Russian ship received on board his vessel at St. Petersburgh certain goods under bills of lading in the ordinary form: "Shipped in good order and condition, &c., to be delivered in the like good order and condition at the port of London." Certain excepted perils were enumerated in the bills of lading, and in the margin thereof were the words, "Weight, contents, and value unknown." The ship arrived at London, and the goods were delivered to the consignees, but a great number of them were found to be in a damaged state. At the hearing of a cause under the 6th section of the Almiralty Court Act, 1861, instituted on behalf of the consignees against the ship, it was proved that the damaged goods were, when taken out of the ship, in an unmerchantable state, and damaged both externally and internally, and that the damage was recent, and not traceable to any inherent vice in the goods:

Held, that, in the absence of any satisfactory proof on the part of the shipowners that the goods were in bad condition when shipped, it was not incumbent on the plaintiffs, in order to establish their case, to prove where or how the goods became damaged:

Held, that the bills of lading afforded evidence that externally, and so far as met the eye, the goods had been shipped in good order and condition.

The Peter der Grosse. 1875

THIS was a cause instituted under the 6th section of the Admiralty Court Act, 1861, on behalf of Messrs. Schoetensack, Riecken & Co., of London, merchants, consignees of cargo laden on board the Russian vessel Peter der Grosse, against the said vessel and against the St. Petersburgh Steamship Company of St. Petersburgh, the owners of the said vessel intervening as defendants.

The petition contained the following allegations:—

1. In the month of June, 1874, Scheumann & Spiegel shipped on board the above named Russian vessel Peter der Grosse, then lying in the harbor of St. Petersburgh, seventeen bales of down and eight bales of feathers respectively, in good order and condition. And the master of the said vessel accepted and received the same, to be carried on board the said vessel from St. Petersburgh to London, and to be then delivered to the plaintiffs upon the terms of five bills of lading duly signed and delivered by the said master to the said Scheumann & Spiegel. The said bills of lading were and are all of the same tenor and date, and were and are in the words and figures following:—

"Shipped in good order and well conditioned by Scheumann & Spiegel in and upon the good steamship, called the Peter der Grosse, whereof is master for this *present voyage H. Yodtmann, now lying at anchor in the harbor of St. [415
Petersburgh, and bound for London.

7	bales	Down, gross	weight	35P.	38lb.
10	"	do.	"	51P.	15lb.
5	"	Feathers	"	25P.	27lb.
3	"	do.	"	15P.	16lb.

being marked and numbered as in the margin, which are to be delivered in the like good order, and well conditioned, at the aforesaid port of London (the act of God, the Queen's enemies, fire, machinery, boilers, steam, and all and every other dangers and accidents of the seas, rivers, and steam navigation, of whatever nature and kind soever excepted) unto Messrs. Schoetensack, Riecken & Co., or to their assigns, he or they paying freight for the said goods, at 70/d. Stg. pr. ton, gross weight in full, with primage and average accustomed. In witness whereof the master or purser of the said ship hath signed 5 bills of lading all of this tenor and date, one of which bills being accomplished, the others to stand void.

"Dated in St. Petersburgh, the 8 June, 1874.

"H. Yodtmann.

"Not accountable for accidents from fire at sea or on shore. Weight, contents, and value unknown. These goods, if not taken out within 24 hours after ship's arrival, the master to be at liberty to enter and land the same at the consignees' expense and risk."

2. The said ship proceeded on her voyage with the said bales of down and feathers on board her, and duly arrived therewith in the port of London.

3. The plaintiffs, who were and are the consignees of the said bales of down and feathers within the meaning of s. 6

of the Admiralty Court Act, 1861, did all things on their part necessary to entitle them, and became entitled, to have the said bales of down and feathers delivered to them in like good order and well conditioned as when shipped on board the said ship as aforesaid; but the defendants and the master of the said ship did not deliver the said cargo to the plaintiffs in such good order and condition, but, on the contrary, delivered a great number of the said bales in a much worse order and condition, and saturated with and damaged by some offensively smelling matter.

4. The defendants were not prevented by any of the perils or matters excepted in the said bills of lading from delivering the said bales of down and feathers to the plaintiffs in as good order and condition as they were in when shipped as aforesaid.

5. The defendants and the master of the said ship neglected to properly stow the said cargo, or improperly stowed it in juxtaposition to other goods, or neglected to take proper care to preserve the said cargo from being damaged.

6. By reason of the premises, the plaintiffs have lost a great part of the value of the said down and feathers, and have been put to a great expense about the same.

On behalf of the defendants the following answer was filed:—

1. The solicitors for the defendants deny the allegations contained in all the articles of the said petition, save and except the second article.

416] *2. The said loss or damage was not occasioned by any negligence, breach of contract, or breach of duty of or on the part of the defendants or their servants.

3. The said alleged damage was occasioned by a vice inherent in the said down and feathers.

4. The said down and feathers had, when put on board, a considerable amount of animal matter therein, and were improperly cured.

5. The said goods were received on board the said ship and were carefully and properly stowed, and every care was taken by the defendants and their servants to preserve the said goods from damage, and the said damage was not occasioned wholly or in part by improper stowage.

6. The said down and feathers were not stowed in juxtaposition to other goods of an offensive nature, and no goods were shipped on board the said ship which could possibly have occasioned any damage to the said down and feathers.

The case came on to be heard on oral evidence on the 21st

of July, 1875, and the hearing was continued on the 22d of July.

The result of the evidence appears from the judgment.

A. L. Smith and *Charles Hall*, for the defendants: The plaintiffs have not made out their case. They have not succeeded in proving that the damage done to the goods in this case resulted from the default of the defendants: *The Ida* (1). It must be admitted that, where a clean bill of lading has been given, a presumption that the goods were shipped in good order and condition is created against the shipowners, and the goods, if delivered damaged, will be considered to have been damaged during the voyage, unless this presumption is rebutted. This presumption, however, cannot arise when goods have been shipped under a modified bill of lading, as was done in the present case. The effect of the note on the margin of the bill of lading is to prevent any such presumption arising. Thus, in *Jessel* v. *Bath* (2), the marginal note, "Weight unknown," entirely nullified the statement of weight in the body of the bill of lading. Similarly here the words "Contents unknown" throw the burthen of proof on the plaintiffs. The plaintiffs have not established even a *prima facie* case that the damage occurred from the neglect or default of those on board the ship. The bill of lading, even without the marginal note, would be no estoppel, and the evidence on behalf of the defendants would be sufficient to rebut any presumption to be drawn from bill of lading terms; whilst, if due effect be given to the words in the *margin, the plaintiffs [417 have certainly not succeeded in discharging the onus of proof incumbent on them, much less have they displaced the case set up on the part of the defendants.

E. C. Clarkson and *W. G. F. Phillimore*, for the plaintiffs: The plaintiffs do not claim to put the bill of lading, modified as it is by the note, "Contents unknown," higher than this, that it supplies clear evidence that the external condition of the goods when shipped was good. Now positive evidence has been given that the same goods were received from the ship in a dirty—in an unmerchantable condition. Surely the statement, "Contents unknown," cannot be taken to have the force of a declaration that the goods were unmerchantable. The bad condition of the bales when landed was apparent to everybody, and, assuming the bill of lading to afford, as the plaintiffs contend it does, evidence that the external condition of the goods when shipped was good, the only question to be determined really is, Did

(1) 2 Asp. Mar. Cas., 551. (2) Law Rep., 2 Ex., 267.

this bad condition come from an external or an internal cause? The evidence goes to prove that the bales were damaged from some external cause, and that the feathers contained in the bales were free from inherent vice. If this be so, it is immaterial to inquire whether the bill of lading supplies evidence that the internal condition of the bales when put on board was good. Moreover, it cannot be incumbent on the plaintiffs to go further and show conclusively how the damage was caused.

SIR ROBERT PHILLIMORE: This suit relates to seventeen bales of down and eight bales of feathers which were placed on board the vessel Peter der Grosse in the month of June, 1874.

There is no question whatever as to the fact that these bales were taken out of the ship in a bad condition—in what one of the witnesses has called a not merchantable condition. The question which the court has to determine upon the evidence before it is, whether the plaintiffs have succeeded in maintaining the position that these bales were put on board in good order, and that, therefore, the damage must have occurred from some cause with which the plaintiffs may not be acquainted, but which could not arise from the state of the cargo itself when put on board the vessel.

418] *Now the bill of lading says: [His Lordship here read the bill of lading.]

The vessel made a very long voyage, was six weeks before she reached the port of her destination, and she was detained by the necessity of repairs at Revel for seventeen days.

The evidence as to the state of the bales when they were taken out is important, not only with respect to the latter part of the case, but in respect to the former part.

Soon after their arrival early intelligence was given by the consignees of their objection to the state of the cargo. I need not enter into the details of the letters which passed as to the state of these goods when they arrived.

One fact is very clearly established by all the witnesses, and is undisputed in the case, that the feathers were of the very best class, and the down also, that could be imported. They were surveyed by two gentlemen experienced in the business, one appointed by the consignees and one by the shipowners. Mr. Brooks was the person appointed by the consignees, and he surveyed the feathers and down in company with another gentleman, whose name was Blumenthal, and he gives evidence that a clerk was present from Messrs. Bailey & Leetham, who were the representatives of the owners

of the ship during the time, and he put in a report. The essential part of his report was, that the bales emitted a very bad smell, which smell was, to use the expression of the witness, foreign to the natural smell of feathers, and in his opinion, also, the damage to them must have come from the outside. He said there was no appearance of heat, the outside of the canvass bags in which these feathers were placed was more or less dirty. I think it was stated that they were bags five feet high or thereabouts and three feet broad. He said they were stained with a black stain, and they also smelt more or less. That is the substance of the evidence given by Mr. Brooks. Mr. Blumenthal, who, as I said, was appointed on behalf of the shipowners, says that he deals in down and feathers, and he understands that business, and he surveyed these bales, and he states that the outside was as if some liquid had been poured over them, while the inside had an offensive smell more or less through it, certainly not a natural smell: something quite strange to the *article. [419 And then another witness was examined, also conversant with what is called the feather business, a gentleman of the name of Worrall, who said he imported a great deal, and that he bought a parcel of feathers from the plaintiffs in this case by sample; he afterwards refused to take the feathers on account of the condition in which they were; he said that he got notice that the goods were damaged; that he went down to the quay the next morning and found every bag stained more or less in the side and some in the middle; he put his hand nearly through, and he says the damage was from the outside decidedly, it certainly was not caused by the inherent heating. He proceeded to say that the smell was a very bad one, and certainly one not natural to the feathers, and I think he said from eight to twelve inches in the interior was quite wet; he refused to accept the feathers; he said that the smell of heat in feathers would be quite different; he said in cross-examination that he put his hand in and that they were of an oily or greasy appearance.

The next witness of importance is, I think, the lighterman who fetched the bales from the Peter der Grosse, and he, when he received these goods, called attention to their condition, because, he said, they looked as if they had been in mud, and when he gave his receipt for them it was in these words: "Received the within in good condition into barge Result, No. 1,765, to be landed at the custom house. Bales dirty." There he delivered them to Mr. Mackenzie at the custom house quay, who was manager to Mr. Dudley Smith. Mr. Mackenzie said the goods were landed about

the 27th of July; that the outside of the bales was dirty and damp—they looked as if they had been drawn across the deck, the cause of their condition was recent—and they were not externally in a merchantable condition; he did not examine the inside.

It is clear, therefore, that these goods were taken out in an unmerchantable condition, and that they were damaged externally as well as internally; that the damage was recent; that the damage was not one which would be naturally inherent in any goods, or in the feathers and down themselves; and that the feathers and down themselves were of the very best quality. Now, these points being established, it becomes important to consider what evidence is furnished by the bill of lading as to their condition when they were 420] *put on board; and I agree with the observation which has been made by Mr. Clarkson, that, fairly construed, and giving all due weight to the legal effect of the marginal note, the result must be that apparently, and so far as met the eye, they were placed in good order on board this ship. Well, then, if that be so, and externally, the plaintiffs have shown by *prima facie* evidence that having put these bales and bags in good order on board the ship, they were taken out in bad order both externally and internally, I agree with the observation which was made that it is not incumbent on them to show either how or when the damage was done. It is for the defendants to displace the evidence, which certainly shows that it did not occur from any internal mischief inherent in the feathers or the down, and was not one which had any external appearance when they were put on board the ship.

It has been asserted that the shipowners have proved the impossibility of the mischief having happened on board the ship. But it does not appear to me that the evidence goes to that length. There were spirits of a strong smell on board this ship. There were passengers who, for a short time, were living in the vicinity of this cargo, in and amidst the cargo. The vessel was seventeen days at Revel, and the cargo was discharged, I think, according to the evidence, all about the same time; and there was a leaking cask or casks among the cargo; but, giving due weight to these circstances, I do not think that they furnish adequate reasons for the damage which unquestionably happened to these goods, or that by such suggestion the defendants have displaced the proof adduced by the plaintiffs by showing that when these goods were put on board the vessel they were in a bad condition internally, and that this bad condition ap-

peared at the time in the external state of the packages in which they were placed.

Upon the whole, I think that the sound conclusion from the facts proved before me is that the plaintiffs have established their case.

I therefore pronounce for the petitioners, and I must order all documents and vouchers to be referred to the Registrar to report the amount of the damage done.

Solicitors for plaintiffs: *Stibbard & Cronshey.*
Solicitors for defendants: *Plews & Irvine.*

[1 Probate Division, 429.]

May 16, 1876.

*In the Goods of BANGHAM (1). [429

Will—Revoked by Marriage—Subsequent Will—Conditional Revival of first—Incorporation.

The deceased, having duly executed his will, married, and subsequently executed another will in favor of his wife and children. In this last will, in case there were no child or children of the marriage living at the death of his wife, he revived and brought into force again his former will, and directed that its provisions and directions should be complied with as though they formed part of his last will. At the time of his death there were living a widow and one child:

Held, that the first will should be included in the probate.

THE Rev. Thomas Alfred Bangham, of St. Michael, Lichfield, clerk, died on the 22d of February, 1876. On the 21st of May, 1863, he executed a will, in which he appointed the Rev. William Nathaniel Griffin and William Odell executors. By this will he gave several bequests to charitable institutions, £2,500 for the benefit of his paternal, and £2,500 for the benefit of his maternal, relatives, and the residue to William Nathaniel Griffin. He subsequently married, and on the 13th of January, 1875, he executed another will, in which he named as executors the same persons as in the first will. By this second will, with exception of a few legacies, the property was left to the executors in trust for the benefit of his wife and children. It contained the following clause: "But if my wife at her death have no children, both hers and mine, surviving her, and if also my said wife leave no grandchildren, both hers and mine, surviving her, then, but not otherwise, I hereby revive and bring into force again my former will made before my marriage, and dated the 21st day of May, 1863, and witnessed by Alfred S. Trevor, of Bridgnorth, and by Dodo Davis Jones, of Bridgnorth, and direct that all its provisions and directions shall be complied

(1) See next case.

with, as though it formed part of this my last will and testament, except that, whatsoever sum any person or persons, or societies, shall have received under the provisions and directions of this will, he and she and they shall receive that same amount less under my revived will than if they had not already received it under this my last will; but there
430] shall not be any *consideration of or deduction made for interest on the sum already received. If in any particular the directions of my revived will, dated as beforesaid, the 21st day of May, 1863, be inconsistent with the directions of this my last will, my will is that the directions of this my last will shall overrule those of my revived will, neither shall the directions of my said revived will have any force until the directions of this my last will shall have been fully complied with." The deceased left a widow, Frances Helena Mary Bangham, and a daughter and only child, Helena Jane Palk Bangham, surviving him.

Searle moved for probate of both wills—the first as incorporated in the last: The words of reference are distinct, and in the events referred to, probate of the former will must be granted. As a matter of convenience it is proper it should be included in the probate at the present time. A difficulty arose in the registry on the ground that, as a widow and child are living, the former will may never come into operation. [He referred to *In the Goods of Cooper* (').]

Sir J. Hannen (President): I am of opinion that it will be convenient that these two wills should be included in the probate. The question is, whether I shall treat the first will as incorporated in the last, or whether, on the events referred to in the last will occurring, upon which the operation of the earlier document is made to depend, the parties should then apply to have it included in the probate. It has been properly stated that the testator merely referred to the former document for his own convenience, and to save trouble. If he had set out in his last will all the provisions of the first one, of course they would have been incorporated in the probate; but to save trouble, instead of writing out all the clauses, he says, in certain events, "I hereby revive and bring into force again my former will made before my marriage." If the earlier will be not incorporated, it must be preserved in the registry, in order to enable the parties to see what is to be done with the property in certain events; but it seems to me that it will save expense and
431] trouble if the first will *be at once incorporated.

(') Deane, Eccl., 9.

Although, from a legal point of view, it makes little difference which way the question is decided, the balance of convenience is in favor of the application.

Solicitors: *Hughes, Hooker, Buttanshaw & Murton.*

For statutory provisions in New York as to revocation by the birth of a child, marriage, etc., see 2 R. S., 64, 65, §§ 43, 44, 49, as amended in 1869, p. 40.

For cases under these sections as to birth of children subsequent to will: 1 Redfield on Wills, 292; 1 Jarm. on Wills, 107 marg. p.; Cotheal *v.* Cotheal, 40 N. Y., 405; Sanford *v.* Sanford, 4 Hun, 753; Bloomer *v.* Bloomer, 2 Bradf., 339.

As to subsequent marriage: Lathrop *v.* Dunlop, 1 N. Y. Weekly Dig., 265, 63 N. Y., 610, affirming 4 Hun, 213; Loomis *v.* Loomis, 51 Barb., 257; Matter of Carey's Estate, 49 Verm., 236; Miller *v.* Phillips, 9 Rhode Island, 141.

[1 Probate Division, 431.]

May 23, 1876.

James and Others v. Shrimpton and Others (1).

Will—Revocation by Marriage—Revival by a duly executed Codicil—Destruction of Codicil—Probate.

The testator having duly executed a will, subsequently married. On the day of and after the marriage ceremony he executed a codicil, by which he made a provision for his wife, and in all other respects revived, ratified, and confirmed his will. His wife predeceased him, and on his death the codicil, which had been in his possession, could not be found. Declarations of the testator of a desire to adhere to his will were proved extending up to the latest period of his life:

Held, that the testator could not have intended by the destruction of the codicil to render his will inoperative, and that the court would therefore grant probate of the will and of the codicil as contained in a draft from which the original was prepared for execution.

John James, of Leamington Priors, Warwickshire, needle and fish-hook manufacturer, died on the 25th of June, 1875, having duly executed a will bearing date the 12th day of October, 1871. At that time the deceased was a widower, and the bequests in his will were almost entirely in favor of his children and grandchildren. On the 3d of July, 1872, he was married at Llandudno, North Wales, to Miss Emily Dickinson, and on the same day, and subsequently to the marriage ceremony, he duly executed a codicil to his will, by which he left to her certain articles of furniture, plate, &c., and wine and consumable articles in his dwelling house at his death, and also the interest of £3,000 for her life; and he further revived, ratified, and confirmed in every other respect his said will. On the 28th of December, 1874, Mrs. James died. In May, 1875, the deceased produced to his housekeeper, Miss Bromley, a sealed packet, indorsed "the

(1) See preceding case.

will of John James, also letters to the family, and instructions for his funeral," and directed her in case of his death to give it to his son Charles, one of the plaintiffs. This was
432] done, but when opened it *was found to contain the will only and not the codicil, which, although it had been in the possession of the deceased, was not forthcoming, and it was believed that the deceased had destroyed it on the death of his wife, in the belief that it would be inoperative. Declarations of the deceased, showing that he adhered to his will up to a very late period of his life, were proved. The plaintiffs, as executors, propounded the will of the deceased, dated the 12th of October, 1871, and the codicil of the 3d of July, 1872, as contained in the draft from which the original was prepared for execution. The defendants interested in an intestacy appeared and gave in a formal defence, but did not oppose the grant issuing as prayed.

May 2. Dr. *Spinks*, Q.C., and *C. A. Middleton*, appeared for the plaintiffs.

Searle, appeared for the defendants.

May 23. Sir J. Hannen (President): This case was tried before me and the following facts were proved: On the 12th of October, 1871, the testator duly executed his will, and on the 3d of July, 1872, he married, whereby his will was revoked. On the same day, and after his marriage, he executed a codicil, in which he made a provision for his wife; and the codicil contained a clause to this effect: "In all other respects I revive, ratify, and confirm my said will." Afterwards circumstances occurred by reason of which the provisions of the codicil failed, and it is probable that he then destroyed it. The question for my consideration is, whether the destruction of the codicil upon which the revival of the will depended has left the will inoperative. I am of opinion that it was not the intention of the testator to leave the will inoperative, but his idea was, that the will, having been brought into existence again, remained valid notwithstanding the destruction of the codicil. I was asked to grant probate of the will and codicil on the presumption that what the testator had done had not been done *animo revocandi*. Where there has been a physical destruction of a testamentary paper the court has often been called upon to form an opinion as to the intention of a deceased at the time he did the act. In this case I have come to the conclusion that the
433] *testator destroyed the codicil with no intention of revoking the will, and that the court should give no more effect to the act than it would do if the testator had destroyed the paper under a mistake as to the instrument he

was destroying. It was done under a misconception of the effect of the act; it was not done *animo revocandi*, and I therefore decree probate of the will and codicil.

Solicitors for plaintiffs: *Jenner & Dyke.*

Solicitors for defendants: *Deacon, Son & Rogers.*

See 17 Eng. R., 543 note.

[1 Probate Division, 433.]

June 27, 1876.

In the Goods of BRADDOCK.

Codicil attached to Will—Subscription and Attestation of Witnesses to Codicil on Back of Will.

The witnesses to the execution of a codicil signed their names on the back of a will, to which that codicil was attached by a pin. There was evidence which satisfied the court that the will and codicil were pinned together at the time of the execution of the codicil, and that the witnesses intended by their subscription on the back of the will to attest the signature of the testatrix at the foot of the codicil:

***Held,* that the codicil was entitled to probate.**

MARY ANN BRADDOCK, late of Liverpool, in the county of Lancaster, widow, died on the 9th of February, 1876. She wrote out and duly executed a holograph will, bearing date the 24th of November, 1864. This will, together with the execution and attestation of the witnesses, occupied one side of a sheet of paper.

On the 25th of January, 1876, the testatrix produced this will to two persons named Sarah Jane Williams and Louisa Ann Dakin. When it was so produced, it had attached to it by a pin a smaller piece of paper unsigned, containing, in the testatrix's handwriting, some bequests to her sister and her sister's grandchildren. In the presence of these two witnesses the testatrix then did the following acts. First, she altered a bequest in the original will by striking out the name of a legatee and substituting by interlineation the names of other legatees. Then she traced over her signature at the foot of the original will with a dry pen, and, lastly, she signed her name at the foot or end of the smaller piece *of [434 paper, which was pinned on to the original will. Sarah Jane Williams thereupon, at the request of the testatrix, wrote on the back of the original will the following words: "Also signed this day in the presence of each other, January 25th, 1876."

Immediately below these words Sarah Jane Williams and Louisa Dakin signed their names in the presence of the testatrix. There was sufficient room for the above words and for the names of the witnesses below the signature of

the testatrix on the smaller piece of paper; but Sarah Jane Williams, in her affidavit, stated that she and her fellow witness, in writing their names where they did, intended to attest both the alteration in the original will and the execution of the smaller piece of paper attached thereto.

June 13. *C. A. Middleton* moved for probate of both papers, together with the alteration in the first: The second paper was duly executed. It is immaterial on what part of the paper the witnesses subscribe their names. Parol evidence of their intention to attest will be acted on, unless the position of their signatures be inconsistent with such evidence. Here the words written by Williams confirm her evidence, for nothing was signed by the testatrix on the 25th of January, 1876, except the second paper: *In the Goods of Davis* (1); *In the Goods of Chamney* (2); *Roberts* v. *Phillips* (3); *In the Goods of Wilson* (4). In this case the subscription of the witnesses is on a different sheet of paper from the signature of the testatrix, but the two sheets were pinned together. This distinguishes the case from *In the Goods of Pearse* (5). If the second paper was duly executed, it rendered valid the alteration in the first paper.

Cur. adv. vult.

June 27. Sir J. Hannen (President): In this case the witnesses, instead of attesting the signature of the testatrix on the paper itself, attested on the back of the original will, to which that paper was attached by a pin. The law does not require that the attestation should be in any particular
435] place, provided that the *evidence satisfies the court that the witnesses in writing their names had the intention of attesting. But the attestation, if not on the same sheet of paper as the signature of the testator, must be on a paper physically connected with that sheet. No particular mode of affixing one piece of paper to another is prescribed by law, and I cannot say that the fastening of two sheets of paper together by a pin is an insufficient mode of connection, or that it is less effectual than the lawyer's mode of fastening by a tape. Here I am satisfied by the evidence that the papers were connected together, and that in writing their names on the back of the original will, the witnesses intended to attest the signature of the testatrix at the foot of the codicil, that codicil being duly executed, confirms the will in its altered state, and probate will go accordingly.

Solicitor: *Waddilove.*

(1) 3 Curt., 748.
(2) 1 Roberts. Eccl., 757.
(3) 4 E. & B., 450; 24 L. J. (Q.B.), 171.
(4) Law Rep., 1 P. & M., 269.
(5) Law Rep., 1 P. & M., 382.

[1 Probate Division, 452.]

June 18, 1876.

*THE PARANA. (6664.) [452

Damage to Cargo—Measure of Damage—Loss of Market.

An action under s. 6 of the Admiralty Court Act, 1861 (24 Vict. c. 10), was instituted on behalf of the assignee of a cargo of hemp and other goods against a British ship, to recover damages resulting from alleged unreasonable delay in the carriage of the goods. The owner of the ship admitted his liability, and the amount of damage was referred to the Registrar, assisted with merchants, to report upon. The Registrar found that there had been a fall in the market value of hemp, between the date when the ship ought to have delivered her cargo and the date when the delivery actually took place, and reported that the plaintiff was entitled to 5 per cent. interest on the invoice value of the hemp during the period of delay, and was not entitled to further compensation in respect of the delay in the delivery of the hemp:

Held, on appeal, that the Registrar ought to have included in the damages the difference between the market price of the cargo at the time when it was delivered and at the time when it ought to have been delivered.

THIS was a cause instituted under the 6th section of the Admiralty Court Act, 1861 (24 Vict. c. 10), on behalf of the assignee of the bills of lading of certain goods laden on board the steamship *Parana, to recover damages [453 resulting from unreasonable delay in the carriage of the goods. The owner of the Parana having admitted his liability for the damage proceeded for, an order was made directing the Registrar, assisted by merchants, to report upon the amount of such damages.

The Registrar made the following report, in which all the material facts are stated:—

The suit was originally instituted on the 4th of December, 1873, pleadings were filed, and a commission was issued for the examination of witnesses at Manilla and Hong Kong; and after the case had been very hotly contested throughout, and a day had been appointed for the hearing, the defendant at length, on the 14th of April, 1875, admitted his liability and consented to a reference of the accounts to the Registrar and merchants. The delay, however, did not end here, for it was not until the 14th of December, eight months afterwards, that the plaintiff brought in his claim.

Affidavits having been subsequently filed by both parties, the case came before myself and the merchants on the 27th of January in this year. On that occasion David Wilkinson, the master of the Parana, was examined as a witness, and the log-books of the vessel, which had been brought in, were carefully analyzed with reference to the course and duration of the voyage. The case was then adjourned at the request of both parties for the production of further witnesses.

On the 14th of February we again met, when Mr. John Malcolm Corrie and Mr. Joseph Alfred Noble, two produce brokers, who had made affidavits for the plaintiff, were tendered for cross-examination. Two shipmasters also, Captain William Clark and Captain William Francis Norie, were produced, the former by the plaintiff, the latter by the defendant. These witnesses having been examined, the case was again adjourned to enable the defendant to produce some witnesses who had been unable to attend on that occasion.

Owing to the engagements of counsel elsewhere, the case did not come on

again until the 13th of April instant, when the defendant having stated that it was not intended to call any further witnesses, counsel were heard as well on the facts as on the questions of law which had been raised in the case.

The facts are as follow: The Parana was a trading steam vessel of 1,372 tons gross and 1,027 net register, and she was of 180 horse-power, nominal, which the master stated was a small power for a vessel of her size. When she left England she was, according to the master, "frightfully deep," having from 1,000 to 1,300 tons of iron as dead weight, and she was filled up with light goods. She took ninety days to get to Hong Kong, and having there discharged her cargo, was docked, surveyed, and repaired. She thence proceeded in ballast to Manilla, where the master entered into a charterparty with Messrs. Engster & Co. to load a cargo at Manilla and Ilo-Ilo, and to proceed therewith to London, passing through the Suez Canal. In pursuance of the charterparty she took on board some parcels of hemp and sugar at Manilla, and having sailed to Ilo-Ilo, she there took in further parcels of sugar; but as the charterers were not able to supply her with a full cargo, it was agreed that she should be at liberty on the homeward voyage to call in at Singapore to fill up.

454] *She left Ilo-Ilo on the 24th of July, 1873, but owing to the defective state of her boilers she was obliged, on the 30th of the same month, to put into Labuan for repairs. Thence she proceeded to Singapore, where she took in some cargo and a large quantity of coals, and having effected some further repairs to the boilers, she again proceeded on her voyage. On the 18th of August, owing to the state of the boilers, she was obliged to put into Acheen, and after effecting some further repairs, she again proceeded. On the 1st of September she had to alter her course for Point de Galle, it being found that she could only carry 11 lbs. of steam. She arrived in Point de Galle on the 4th of September, and having completed her repairs, she left again on the 9th. On the 1st of October she arrived at Aden, where further repairs were done to the boilers; and again at Port Said, at Malta, and at Gibraltar; so that it was not until the 28th of November, 1873, 127 days after leaving Ilo-Ilo, that she arrived in the port of London.

As to the lamentable state in which this vessel's boilers were there can be no two opinions. It seems that, after the vessel had discharged her cargo, she proceeded to Greenock, where her boilers were taken out. We have no information as to what may have been the condition of one of the boilers, as it was broken up before the surveyors saw it, but the other was examined by two practical engineers, who reported that of the eighty-three tubes of which the boiler originally consisted, one had never been used, and twenty-one others had been plugged up with either iron covers or wooden plugs, so that only sixty-one tubes were at all effective. It was found also that the backs of both furnaces had been patched with large patches, and that there were traces of considerable leakage on the crowns of the furnaces. There were also numerous patches on the shell of the boiler, varying from 4 ft. long by 2 ft. 3 in. wide to 12 in. long by 8 in. wide. The rivets also were worn away by long use, so that they had but little hold of the plates, and some of the plates were worn away by corrosion to half their original thickness. They further said that, although the boiler when new was constructed to bear a pressure of from 30 lbs. to 35 lbs. of steam to the square inch, they thought that, in the condition in which they found it, she could not with safety have borne a pressure of more than 10 or 12 lbs. There is no reason to suppose that the boiler which had been broken up was in any better condition. A more lamentable state of affairs can hardly be imagined. To any one at all acquainted with the construction of steam engines it is apparent that, with engines originally of small power, with a tubular boiler, of which twenty-two out of eighty-three of the tubes were perfectly useless, of which the plates were so much worn away that they would bear only 10 or 12 lbs. instead of 30 to 35 lbs. to the square inch, and with the crowns of the furnaces leaking badly, the available power to contend with the southwest monsoon must have been very small; and it can therefore hardly be wondered at that the vessel made on an average but four knots an hour, and that she had frequently to put into port for repairs and to replenish her stock of coals.

These being the undisputed facts in the case, we will now look at the pleadings.

The plaintiff in his petition pleaded that the sugar which had been put on board was what is called "wet sugar," from which there is more or less drainage during the voyage; and that, owing to the "unreasonable" length of the voyage, the drainage had been greater than it would have been had the voyage been of the ordinary duration; and that he had thus sustained a loss, which he estimated *at 3 per cent. of the whole amount of sugar shipped. He [455 also stated that, by the delay in the arrival of the vessel, he had lost a good market for the hemp, and that his loss on this account was about 20*s.* a ton. He claimed also interest on the invoice value of the cargo for the time during which he had been improperly kept out of it by the delay in the arrival.

In his answer the defendant, the owner of the ship, pleaded, first, that there had been no unreasonable delay in the carriage of the goods, or that, if there had been, it was due to the dangers and accidents of the seas, one of the exceptions provided for in the charterparty and bills of lading; secondly, that if there had been any excessive drainage from the sugar, it was due to the character and quality of the sugar when shipped. Both these pleas were, however, subsequently withdrawn, and the defendant ultimately admitted his liability for any damage which the owner of the cargo might have sustained by reason of the delay, and for which he would be legally liable. He has further, through his counsel, admitted in the proceedings before us that there was some unreasonable delay, and that he was ready to make good any damages necessarily resulting therefrom.

This admission of the defendant has relieved us from having to decide a question, which, I confess, appears to me to be one of very great difficulty, namely, whether there was any such implied contract on the part of the shipowner to perform the voyage within a certain time, so that if that time was exceeded owing to the defective state of the vessel's engines or boilers, the shipowner would be liable to the merchant for any loss which he might thereby sustain. I am aware of the case of *Fraser and Others* v. *Telegraph Construction and Maintenance Co.* (1), where the bill of lading having provided that the goods should be shipped on board the steamship Hibernia, it was held that the contract of the defendants was, that they should be carried on board a ship in which the principal motive power should be steam; but there the engines were in good working order, and the ship had a sufficiency of coals on board, but the master, from motives of economy, neglected to use them, and the voyage was consequently unnecessarily prolonged. But that is not quite the same case as the present one, where the boilers were in a bad condition, and where it is not pretended that the master did not do all in his power, by obtaining extra supplies of coal and by repairs, to expedite the vessel on her way.

But be this as it may, we are, as I have already said, relieved from having to consider this question by the admission of the defendant; and all that we have to do is to ascertain, not what would be the average time required to perform such a voyage, but what length of time might have been consumed on the voyage, beyond which the merchant would have had reasonable grounds to complain; what, in fact, would have been an "unreasonably" long voyage. For any excess beyond a reasonable time, and for all the damage directly resulting therefrom the defendant, by the terms of his admission, is liable.

The plaintiff contends that the voyage from Ilo-Ilo ought to have been performed in sixty-five, or at the most in seventy days. But to this the defendant, whilst admitting that 127 was an unreasonable time, demurs, alleging that the vessel was and was well known to the charterers to be a low-power steam vessel, which, under the most favorable conditions, would not go under *steam [456 more than six to seven knots an hour. Without detailing at length the evidence which has been laid before us on this point, we think, looking at all the circumstances of the case, that the plaintiff would have had no "reasonable" grounds of complaint if the voyage from Ilo-Ilo to London had lasted ninety

(1) 1 Law Rep., 7 Q. B., 566.

days. But it did as a fact take 127 days; we think, therefore, that the ship-owner is by his admission liable for the excess of thirty-seven days, during which the voyage lasted, beyond what may be called a not unreasonable time. Taking thirty-seven days, then, as the measure of the unreasonable delay in the voyage, let us consider what damages may be said to have resulted directly from this delay.

And, first, as to the sugar. It seems that the sugar shipped on board at Ilo-Ilo was what is called in the trade "wet sugar," and there was some evidence before us that the drainage from this species of sugar goes on continuously throughout the voyage, however long that voyage may last, and that consequently the greater the length of the voyage, the greater would be the drainage. On the other hand, it was stated that the greatest drainage takes place always in the early part of the voyage, and that when all the moisture has run off the drainage ceases; in proof of which it is said that Ilo-Ilo sugar, which has been landed and warehoused, is sold even a year afterwards on the landing weights, so small is the drainage from it after it has been warehoused. It was answered, however, that, although the drainage might cease after it had been landed and stored in a dry warehouse, it would continue during all the time it remained in the ship exposed to the heat and moist air of the hold. On the whole, the conclusion to which we have come is, that, although undoubtedly the greater part of the drainage does take place at first, it would go on, though not to so great an extent, during all the time it remained in the vessel exposed to the heat and moisture of the hold. According to the owner's affidavit the total quantity shipped was 500 tons; the quantity turned out was said to have been 446 tons 6 cwt., being a loss of 53 tons 14 cwt., or rather more than 10 per cent. on the original shipment. What we have, then, to decide is, what portion of this drainage would be due to the thirty-seven days' delay. The plaintiff puts his loss at 3 per cent., but this would be too much, unless, indeed, we are to assume that the drainage was greater at last than it was at first, which is contrary to the evidence. On the whole, we think that 1½ per cent. on the original shipment, or seven and a half tons, would be a fair allowance to make for the drainage of the last thirty-seven days. And, taking the owner's estimate of the value at £12 10*s.* per ton, we shall allow £93 15*s.* on this item of the claim.

Secondly, as to the interest. It being admitted that the defendant is liable for the damage directly arising from the unreasonable delay in the delivery of the cargo, and that delay having been fixed at thirty-seven days, it follows that interest will have to be allowed for thirty-seven days on the invoice value of the cargo, stated by the plaintiff to be £19,959 9*s.* 11*d.* We shall allow it at the usual mercantile rate of 5 per cent., which will give under this head of the claim the sum of £101 8*s.* 3*d.*

There remains the last and by far the most important question, namely, whether the plaintiff is entitled to any compensation for the alleged loss of market by reason of the non-delivery of the cargo within a "reasonable" time. The question does not arise on the sugar, in regard to which no claim has been made for loss of market, but on the hemp only.

It was said by the plaintiff that, had the vessel arrived by the middle of
457] *October, or even by the 22d or 23d of October, which would be about ninety days after leaving Ilo-Ilo, the hemp could have been sold for about £41 10*s.* per ton; but that, not having arrived until the 28th of November, it was impossible to get the hemp landed and placed on the market before the middle of December, and that it was then impossible to get within 20*s.* a ton of that price. It was said that the owner continued to hold the hemp in hopes that the market would rally, but that it never did, and that ultimately he had to sell it at a considerable loss. He claimed not indeed the difference between the price at which he might have sold it, had it arrived in October, and the price at which he ultimately did sell it; but the difference between the former, and the price which he might have got for it, immediately after it had been delivered. It was shown that during November and in the first week of December there was a fair demand for hemp at £41 10*s.* per ton, and that that price might have been obtained for it. It was also shown that it would have taken

about three weeks after the vessel's arrival to have got the hemp sampled and put upon the market; that by that time there was no demand for it, and that, although the prices current had not altered much, a seller forcing any quantity upon the market would have had to submit to a reduction of at least 20*s.* in the ton. It was proved also that after Christmas the market continued to fall, owing to large shipments of hemp brought to Liverpool, so that, as one of the brokers observed, the market was knocked all to pieces.

Assuming, then, that by the delay in the delivery there was a loss of market, the question arises whether this is an item which can be properly allowed in a claim of this description; whether, in fact, a claim for loss of market can be allowed on account of an unreasonable delay in the delivery of the goods. The case must have frequently arisen in this court, as, for instance, when a vessel has been run into by another, and the delivery of the cargo has been delayed by the vessel having to put into port for repairs; and yet I think that I may say with certainty that no such claim has ever yet been preferred in this court, certainly not during the time I have held this office, now nearly twenty-three years. It may be, however, that we have hitherto proceeded on a wrong principle, and as the point has been very strongly urged in this case by a counsel who is not wont to maintain an untenable position, I propose to examine carefully all the authorities which have been cited in support of that position, as well as the grounds upon which it has hitherto been thought that a claim for loss of market cannot properly be allowed.

The first case cited by Mr. Clarkson was that of *The St. Cloud* (1), but I fail to see that it has any bearing upon the present case. It was a question of estimating the loss to be paid on a cargo of wheat, which had been damaged by improper stowage, and the court held that the proper mode of ascertaining the loss was to take the difference between the value of the damaged wheat and the price at which undamaged wheat of the same quality could have been purchased in the market at the time when the delivery took place. There was, therefore, no question of loss of market in this case.

The next case was that of *Josling* v. *Irvine* (2), but this was a case in which the defendant had sold by sample to the plaintiff a quantity of naptha; finding out afterwards that the naptha contained benzole, which materially increased its *value beyond the price at which he had agreed to sell it, he refused [458 to make delivery, and the court held that under these circumstances he was liable to the plaintiff for the difference between the price at which he had agreed to sell the naptha and the price at which an article of similar quality could be purchased in the market. Here, again, there was no question of loss of market.

The case of *Collard* v. *South Eastern Ry. Co.* (3) is the one which on the whole comes nearest to the present. In that case the defendants had received some hops from the plaintiff, but instead of forwarding them at once to their destination they had kept them for some days on their premises in an open van, whereby they had become damaged by rain; the plaintiff accordingly had to have them dried before he could put them on the market, and in the meantime the market fell. It was there held that the plaintiff was entitled to recover as damages the difference between the market price, on the day when the hops after being dried were in a fit condition to be placed upon the market, and on the day when they ought to have been delivered in an undamaged state. The case, however, was a peculiar one. It seems to have been thought by the court that the hops could, if it had not been for the negligence of the defendants, have been delivered on a day certain, and that it ought to have been known to the defendants that they were being sent for sale in the market of that day. They, therefore, held that the loss of market was "the natural result of the defendants' breach," and that it was in the "contemplation of the parties when the contract was made." The cases of *Hadley* v. *Baxendale* (4) and *Smeed* v. *Foord* (5), to which

(1) Br. & L., 4.
(2) 6 H. & N., 512; 30 L. J. (Ex.), 78.
(3) 7 H. & N., 79; 30 L. J. (Ex.), 393.
(4) 9 Ex., 341; 23 L. J. (Ex.), 179.
(5) 1 E. & E., 602; 28 L. J. (Q.B.), 178.

I shall presently have occasion to refer, were cited in the case, and Baron Martin, in giving judgment, said: "It seems to me that *Hadley* v. *Baxendale* (1) has no bearing on this case; and I think that *Smeed* v. *Foord* (2) was correctly decided. In my judgment the plaintiff is entitled to recover for this damage, because it is a direct and immediate loss consequent on the defendant's breach of duty." And he added, apparently not quite confident as to the correctness of the conclusion at which he had arrived: "If this case should be taken to the Court of Error, I hope that court will be able to put the rule on an intelligible footing; but at present we must do the best we can with each particular case, and decide it upon principles of reason and good sense."

The other case cited by Mr. Clarkson was that of *Fraser* v. *Telegraph Construction and Maintenance Co.* (3), which has been already referred to, and in which it was held that, where the words "shipped on board the steamship" occurred in the bill of lading, the contract of the defendants was that the goods should be carried on board a ship in which the principal motive power during the voyage should be steam, and that consequently the defendants would be liable for the damages resulting from any unreasonable delay in the delivery. But I do not see that it was there laid down that loss of market was to be regarded as a damage, directly resulting from the delay, which the plaintiff would be entitled to claim.

Such, then, are all the cases which were cited by Mr. Clarkson, and, with the exception perhaps of *Collard* v. *South Eastern Ry. Co.* (4), I do not see that any
459] *of them have any bearing upon the present question. Let us now examine the authorities on the other side, which it appears to me place the question beyond all doubt.

The leading case on this point is, I apprehend, *Hadley* v. *Baxendale* (1). In that case it was held that, where two parties have made a contract "which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

Accordingly the claim of the owner of some flour mills for the loss which he had sustained by the stopping of the mills, owing to the non-delivery of a broken iron shaft, was rejected, it not being in the opinion of the court such a loss as would naturally have arisen in the usual course of things, or as would have been in the contemplation of the parties to the contract. Mr. Baron Alderson, in delivering the judgment of the court, said, "For had the special circumstances been known, the parties might have specially provided for the breach of the contract by special terms as to the damages in that case." And further on he says, "But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it, it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill." "It follows, therefore," says Baron Alderson, "that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been justly and reasonably contemplated by both the parties when they made this contract."

This case was followed by that of *Smeed* v. *Foord* (2), which seems to me to be directly in point. In that case the defendant had contracted to deliver a threshing machine to a farmer within three weeks, for the purpose of threshing his wheat in the field. He failed to perform his contract, and the result was that the wheat got injured by rain, and had to be stacked and kiln-dried. The

(1) 9 Ex., 341; 23 L. J. (Ex.), 179.
(2) 1 E. & E., 602; 28 L. J. (Q.B.), 178.
(3) Law Rep., 7 Q. B., 566.
(4) 7 H. & N., 79; 30 L. J. (Ex.), 393.

plaintiff claimed damages in respect of the cost of stacking it, of kiln-drying it, and for the deterioration caused by its having been wetted; he claimed also for loss of market, the market price of wheat having fallen between the time when it might have been sold had the threshing machine been supplied according to contract, and the time when it was ultimately sent to market after having been dried. The court, on the authority of *Hadley* v. *Baxendale* (1), held that as regards the first three items of the claim, which were the natural results of the breach of contract, the plaintiff was entitled to recover, but that as regards the loss of market he had no claim. Lord Campbell, in giving judgment, said, "He is not, however, in my opinion entitled to any damages in respect of the fall in the market price of the wheat, for that could not have been in the contemplation of the parties when the contract was made; nor can it be said to have been in any way *the natural result of the defendant's breach of [460 contract. For aught that the parties knew, or that naturally might have happened, the price might have been risen instead of fallen." The other judges all concurred in the decision, and on the same grounds.

This case was followed in 1873 by that of *Horne* v. *Midland Ry. Co.* (2), which was an action for delay in delivering a parcel of shoes, and in which the plaintiffs claimed the difference between the price which they would have got for the shoes, had they been delivered in time, and the price for which they ultimately sold them. But the Exchequer Chamber, per Kelly, C.B., Blackburn and Mellor, JJ., Martin and Cleasby, BB., held, on the authority of *Hadley* v. *Baxendale* (1), that the plaintiffs were not entitled to recover this sum, the damage not being such as might reasonably be considered as arising naturally from the defendants' breach of contract, or such as might be reasonably supposed to have been in the contemplation of both parties at the time when they made the contract. The two dissentients, Lush, J., and Pigott, B., did not dispute the authority of *Hadley* v. *Baxendale* (1), but they thought that the notice which had been given to the defendants was sufficient to show that the damages in question were such as might reasonably be considered as having been within the contemplation of the parties at the time they made the contract, as the probable result of a breach of it.

Applying, then, the principles laid down in these cases to the question under consideration, can it be said that the fall in the price of hemp was, to use Lord Campbell's words in the case of *Smeed* v. *Foord* (3), "in the contemplation of the parties when the contract was made," or that it was "the natural result of the defendant's breach of contract? For aught that the parties knew, or that might naturally have happened, the price might have risen instead of fallen."

To show the difficulties and complications into which we should be launched if we admitted the claim for loss of market, I asked whether, if, by the delay in the arrival it had turned out that the market for the sugar had risen, whilst that for the hemp had fallen, we should be at liberty to set off the one against the other; and Mr. Clarkson admitted that we should. I asked further whether, if it had so happened that the market for the hemp had risen, we should be at liberty to set off the gain made by the delay in the delivery against the damage to the sugar by drainage and the claim for interest; and he said that he thought we should. And I then asked whether, if the gain on the former account exceeded the loss on the two last items, so that the plaintiff would have been benefited by the delay, we should be bound to credit the defendant with the difference; and he thought not. It is sufficient to point out some of the difficulties which might occur if the principle of loss of market, which could not by any possibility have been within the contemplation of the parties when this cargo was put on board at Manilla, were admitted.

It seems to me that the cases of *Hadley* v. *Baxendale* (1), *Smeed* v. *Foord* (3), and *Josling* v. *Irvine* (4), are conclusive on the point; and that the practice of the Court of Admiralty in refusing to entertain any claim for loss of market *in such cases, is in entire accordance with that of the courts of com- [461

(1) 9 Ex., 341; 23 L. J. (Ex.), 179.
(2) Law Rep., 8 C. P., 131.
(3) 1 E. & E., 602; 28 L. J. (Q.B.), 178.
(4) 6 H. & N., 512; 30 L. J. (Ex.), 178.

mon law, and I shall refuse to alter that practice until I am corrected by superior authority. I may add that the merchants by whom I am assisted entirely concur with me in the conclusions to which I have come.

It only remains for me to say a few words in regard to the costs of this reference. The general rule in collision cases is that, where more than one-third is taken off, the claimant shall pay the costs of the reference. But this rule does not apply to cases of this description. The defendant, in the first instance, denied altogether his liability and set up several pleas which he afterwards withdrew; the condition of the boilers of his vessel was most discreditable, and he has entailed heavy losses on the plaintiff. He has, moreover, made no tender on account of the sums which the latter was undoubtedly entitled to recover. On the other hand, the plaintiff has failed on the main issue, the question of loss of market. On the whole, we think that justice will be done by leaving each party to pay his own costs of the reference, but the reference fees will have to be paid by them in moieties.

H. C. ROTHERY, Registrar.

May 23. *E. C. Clarkson*, on behalf of the plaintiff, moved the judge in court, in objection to the report of the Registrar, to modify and alter the same so far as it disallowed the sum of £289 5*s.* 9*d.* claimed as damages for the defendant's breach of contract, in respect of the depreciation in value by loss of market on the hemp. It is clear upon all the authorities that the true measure of damage is the difference between the market price when the goods were delivered and the market price when delivery actually took place: *Wilson* v. *Lancashire and Yorkshire Ry. Co.* (1); *Borries* v. *Hutchinson* (2); *O'Hanlan* v. *Great Western Ry. Co.* (3); *Collard* v. *South Eastern Ry. Co.* (4); *Great Western Ry. Co.* v. *Redmayne* (5). No reason can be given why this general rule should not apply in the present case. The damage claimed is damage which the shipowner well knew might probably flow from a breach of his contract. [He referred to the cases cited in the Registrar's report.]

Watkin Williams, Q.C., and *G. Bruce*, for the defendant: The rule of giving fair mercantile interest is a constant rule which can be equally well applied in all cases, and is fair to both parties; whilst, if the measure of damages
462] for delay is held to depend upon *the market value, the amount to be recovered would fluctuate from day to day and vary with the nature of the goods carried. [They referred to the notes to *Vicar* v. *Wilcocks* (6); Phillimore's International Law, 2d ed., vol. iii, p. 698; *The Lucy* (7); *Jackson* v. *Union Marine Insurance Co.* (8); *Cory* v. *Thames*

(1) 9 C. B. (N.S.), 632; 30 L. J. (C.P.), 232.
(2) 18 C. B. (N.S.), 445; 34 L. J. (C.P.), 169.
(3) 6 B. & S., 484; 34 L. J. (Q.B.), 154.
(4) 7 H. & N., 79; 30 L. J. (Ex.), 393.
(5) Law Rep., 1 C. P., 329.
(6) Sm. L. C., vol. ii, 534, ed. 1876.
(7) 3 Rob., 208.
(8) Law Rep., 8 C. P., 572; Law Rep., 10 C. P., 125.

Iron and Shipbuilding Co. (1); *British Columbia Saw Co.* v. *Nettleship* (2).]

Clarkson, in reply.

Cur. adv. vult.

June 13. SIR ROBERT PHILLIMORE: I have taken time to consider my judgment in this case, partly on account of the great number of reported cases to which I was referred, but more especially because, unfortunately, I am unable to agree with the very elaborate and carefully reasoned opinion of the Registrar from whose ruling this appeal has been prosecuted. It is admitted in this case that the carrier must make some compensation to the merchant for the loss sustained by him in consequence of the delay in the execution of the contract. The question is what are to be the items of that compensation.

The Registrar has found that these items are £93 15*s.* for deterioration in quality of a portion of the cargo, and £101 3*s.* 3*d.* for loss of the interest, during the detention in consequence of the delay, at 5 per cent. on the value of the cargo.

The merchant also claims, in addition to these items, the ascertained difference between the market value of the goods at the time when they might have been sold, if the carrier had not unreasonably delayed the fulfilment of his contract, and their value at the time when they did actually arrive; and the justice of this claim is the sole subject of this appeal.

The law applicable to this question has apparently been difficult to ascertain, and the application of it, when ascertained, more difficult.

The general rule of law is stated with his usual clearness by M. Masse, in the last edition of his Droit Commercial, ed. 1862, t. 3, lib. v, tit. 1, ch. iii, s. 4, p. 239: "Mais, comme on l'a déjà vu, *même dans le cas de dol, les dom- [463 mages-intérêts ne peuvent comprendre, à l'égard de la perte éprouvée par le créancier et du gain dont il a été privé, que ce qui est une suite immédiate et directe de l'inexécution de l'obligation. La responsabilité de l'imprévu ne s'étend pas aux faits successifs, qui sont la conséquence éloignée de l'inexécution ou du retard dans l'exécution." The principle of this rule is in different words expressed in the English and American judgments.

In accordance with this principle, the carrier has been holden liable to pay damages, on the hypothesis that he contemplated payment of a certain kind of compensation

(1) Law Rep., 3 Q. B., 181. (2) Law Rep., 3 C. P., 499.

in the event of his not executing, or of his unreasonably delaying to execute, his part of the contract.

Another form of stating this proposition is to be found in the judgment of the Lord Chief Baron, in the Exchequer Chamber, in *Horne* v. *Midland Ry. Co.* (1), decided in the year 1873, where his Lordship states the principle clearly to be deduced from all the authorities to be, "that the damages for a breach of contract must be such as may fairly and reasonably be considered as arising naturally, i.e., according to the usual course of things from such breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

The last English judgment which I have been able to find is one delivered by the Lord Chief Justice in 1876, in the case of *Simpson* v. *London and North Western Ry. Co.* (2). It is the only English case, I think, for the knowledge of which I am not indebted to the industry of counsel. "The law," the Lord Chief Justice says, "as it is to be found in the reported cases, has fluctuated, but the principle is now settled that whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object."

The latest American decision, I believe, is that of *Ward* v. 464] **New York Central Ry. Co.* (3). It is thus stated in a note to the 6th edition of Sedgwick on Damages, p. 433: "It is here held that, where a carrier from mere negligence or plain violation of duty omits to transport merchandise within a reasonable time, and its market value falls in the meantime, 'the true rule of damage is the difference in its value at the time and place it ought to have been delivered, and the time of its actual delivery,' the court observing that 'sagacious men rely upon their ability to judge of the market in undertaking large commercial projects, and according to their views of the market, send their merchandise by a quick or by a slow carrier, and make compensation accordingly. A contrary rule would deprive them of all benefit of a rapid transit.' The court further remarked: 'Had the goods been injured by reason of improper exposure by the carrier, and thus become depreciated in their market

(1) Law Rep., 8 C. P., 131, 137. (2) 1 Q. B. D., 274. (3) 47 N. Y., 29.

value, the carrier would be liable for the loss. Here his negligent delay caused the loss'; the injury also is natural and direct. Arriving later by the carrier's negligence, these goods, measured by the rule that governs the commercial community—by the only standard that regulates values, were not worth so much as at the time when they should have arrived."

I do not refer to other cases besides these two, but I have read them all with care; most of them will be found in the notes at p. 81, ch. iii, and p. 430, ch. xiii, in Mr. Sedgwick's valuable work on the Measure of Damages, 6th edition, to which I have already referred.

The result of the reported decisions is that the merchant may claim to be indemnified for actual loss in the value of the goods shipped (perte qu'il a faite; damnum emergens), and from loss of profit (gain dont il a été privé; lucrum cessans), when such loss is the direct consequence of the carrier's default. Why should not the ascertained difference between the market price, when the goods might have been sold, had there been no delay, and the market price which they would fetch after the delay, be a reasonable measure of the loss of the merchant's profits? The depreciation is the direct consequence of the carrier's default; in other words, he must be taken to have known or contemplated that the *merchant desired a safe and [465 quick transport of his marketable goods to their intended market. This is the ordinary knowledge with which a carrier receives goods, and it is on this principle, as it appears to me, that in *Horne* v. *Midland Ry. Co.* (1), already cited, the difference between the two market prices was considered to be the proper measure of the damages. The case before me is not one of a special private speculation or particular mercantile operation; it is one of the ordinary operations of commerce, in which delay may inflict as much injury on the shipper with respect to the market value of the goods as their deterioration from want of requisite appliances or improper exposure during the passage. Upon the same principle the carrier is responsible for both injuries.

The depreciation in the market value of these goods has been, in my opinion, the natural consequence of the carrier's unreasonable delay, propter rem ipsam non habitam, as the civilians say, and, for the reasons already alleged, I think the shipper is entitled to have included in his damages the difference between the market price at the time when the

(1) Law Rep., 8 C. P., 131.

goods did arrive and at the time when they ought to have arrived.

I must therefore direct that the Registrar's report be varied by adding to the damages allowed the sum of £289 5*s.* 9*d.* which represents the loss of market.

I think that the justice of the case demands that the plaintiff has his costs of the appeal and of the reference.

Solicitors for plaintiff: *Stibbard & Cronshey.*

Solicitors for defendant: *Parker & Clarke.*

[1 Probate Division, 466.]

August 1, 1876.

466] *THE STAR OF INDIA. (K. 94.)

Collision—Measure of Damage—Loss of Charterparty.

A bark, lying in the Madras Roads, was chartered to proceed to the Coromandel coast, and there load a cargo for London, at a freight of 55*s.* per ton. When about to proceed to her loading port, she was run into and seriously damaged by a ship whose owners admitted their liability for the collision. At a reference before the Registrar, assisted by merchants, to assess the damages, it was proved that, owing to the bark having been delayed at Madras for repairs, rendered necessary by the collision, the charterers had acquired a right to cancel the charterparty, and that they had cancelled the charterparty; afterwards, when the repairs were completed, the bark being unable to procure more profitable employment, sailed from Madras for London with cargo, at a freight of 45*s.* per ton. The Registrar disallowed a claim made by the plaintiffs in respect of the loss of the charterparty so cancelled, and the plaintiffs appealed to the court:

Held, that the case must be again referred to the Registrar, with directions to include in the amount of damages a sum in respect of the loss of the charterparty.

THIS was a petition in objection to the report of the registrar in an action of damage, instituted on behalf of the owners of the bark Cheviot against the ship Star of India, and her freight.

The petition in objection alleged substantially as follows:

1. This is an action to recover certain damages alleged by the plaintiffs to have been sustained by them in consequence of a collision between the plaintiffs' vessel, the Cheviot, and the defendants' vessel, the Star of India. The defendants admitted liability for the damage proceeded for, and on the 31st of December, 1875, such damage was referred to the Registrar, assisted by merchants, to report upon the amount thereof.

2. The Registrar on the 27th of March, 1876, made his report. By this report all the items of the plaintiffs' claim are allowed, except the following: Loss of charterparty, £483 18*s.* 9*d.* This item is disallowed. The Registrar has further reported that the plaintiffs should pay the reference

fees, but that otherwise each party ought to pay his own costs of the reference.

3. The plaintiffs object to this report in so far as it disallows the above item and makes the above order as to costs, for these reasons (among others):—

(*a.*) At the time of collision the Cheviot, which was in Madras Roads, was under charter to take a cargo from the Coromandel coast (') to London, at the rate of 83*s.* per ton, net weight delivered, and was heaving short, in order to proceed to Gopalpore, the first port under the charter. The cargo which she would have carried would have been a dead weight cargo.

(*b.*) *The collision occurred on the 1st of May, 1875, [467 and as the Cheviot was so damaged that she could not possibly reach Gopalpore by the 10th of May, the charterers, in accordance with a power given to them to that effect, cancelled the charter.

(*c.*) By the time the Cheviot was repaired the season had nearly closed and freights had fallen.

(*d.*) The Cheviot was not sufficiently repaired to take in cargo till the 4th of July, nor sufficiently repaired to proceed to sea till the 13th of July.

(*e.*) On the 4th of July the Cheviot could have been chartered for a similar voyage to that on which she had been chartered at the rate of 45*s.* a ton; but she could not have sailed for the ports of loading till on or after the 13th; instead thereof she was loaded at Madras on and after the 4th of July, at the rate of 45*s.* per ton of measurement goods.

(*f.*) The plaintiffs' claim is for the difference between the freight which the Cheviot would have earned under the cancelled charterparty and that which she earned under the loading at Madras. The plaintiffs have not claimed or received demurrage for the detention of the Cheviot after the 4th of July.

(*g.*) If the plaintiffs succeed wholly or partially in this claim, the costs of the reference ought to be awarded to them.

The petition prayed the court to order the report to be reformed by allowing to the plaintiffs the said sum of £583 18*s.* 9*d.*, or such part thereof as to the court might seem just.

The report of the Registrar was annexed as an exhibit to

(') The charterparty provided that the ship should proceed to two ports on the Coromandel coast to be declared. The charterers to have the option of cancelling the charterparty if the vessel should not arrive at the first loading port and be ready to take in cargo before the 10th of April, 1875. It appeared that on the 22d of March Gopalpore was declared as the first port.

the petition in objection. So far as is material it was in terms as follows:—

I find that there is due to the plaintiffs, in respect of their said claim, the sum of £577 19*s.* 10*d.*, together with interest thereon as stated in the schedule hereto annexed. And I am also of opinion that each party ought to be left to pay his own costs of the reference, the reference fees to be paid by the plaintiff.

Admiralty Registry, March 27, 1876. H. C. ROTHERY, Registrar.

The schedule annexed to the report was as follows:—

	Claimed.			Allowed.		
1. Demurrage of the bark Cheviot, of 494 tons, at 4*d.* per ton per day, from 1st May to 4th July, 1875, viz., 65 days .	£ 535	*s.* 3	*d.* 4	£ 535	*s.* 3	*d.* 4
2. Loss of charterparty . .	583	18	9	0	0	0
3. Surveyor's fees at Madras .	15	16	3	15	16	3
4. Telegrams from Madras . .	16	15	3	16	15	3
5. Telegrams from Glasgow to Madras	6	10	0	6	10	0
6. Repairs to figure-head . .	3	15	0	3	15	0
	£1161	18	7	577	19	10

468] *With interest at 4 per cent. per annum, from the 4th of July, 1875, until paid.

The answer of the defendants contained the following allegations:—

"The alleged damage claimed by the plaintiffs in respect of the loss of the said charterparty was too uncertain and too remote, and it was therefore properly disallowed by the Registrar.

"Regard being had to the demurrage allowed to the plaintiffs, and to the other facts and circumstances of the case, the plaintiffs failed to prove that they had in fact incurred any loss by reason of their not having fulfilled the said charterparty, and on the contrary the profits actually earned by the plaintiffs were fully equal to the profits which they would have earned, had the Cheviot performed the said voyage to Gopalpore and received her intended cargo and proceeded to London therewith, and delivered the same there.

"The defendants have always been ready and willing to settle the claims of the plaintiffs other than the said claim for loss of charterparty, from which latter claim alone the necessity for the reference arose."

It appears by the judgment that the principal facts alleged in the petition in objection were supported by the evidence produced before the Registrar.

The Star of India. 1876

July 11, 18. *Watkin Williams*, Q.C., and *W. G. F. Phillimore*, for the plaintiffs in objection to the report: The plaintiffs were prevented by the collision from fulfilling the charter they had entered into, and from earning the amount of freight due thereunder. It is true that the plaintiffs are not entitled to recover from the defendants the entire amount stipulated for on the charterparty, inasmuch as they obtained a cargo from Madras at a lower rate of freight, but they are clearly entitled to some sum in respect of the loss of their charter even after all reasonable deductions have been made: *Jebsen* v. *East and West India Dock Co.* (1). The rules applicable in cases of contracts do not govern in cases of tort: *France* v. *Gaudet* (2), *Davis* v. *Garrett* (3), *Rowley* v. *London and North Western Ry. Co.* (4). At the time of the collision the adventure for which the bark was chartered had virtually commenced, and if insured for the voyage, the vessel would have been at the risk of her underwriters: Maude and Pollock, Merchant Shipping, p. 305, ed. 1861.

E. C. Clarkson, for the defendants: Sufficient compensation has been allowed the plaintiffs. The damages they seek are too *remote and uncertain: *Hoey* v. *Felton* (5); [469 *Walker* v. *Goe* (6). The immediate cause of the loss of the charterparty was the act of the charterers in exercising their option to cancel the charter. The only cases in which, by the practice of the Court of Admiralty, the loss of a charterparty has been considered in assessing the damages occasioned by a collision, are cases where a vessel has been damaged when at her loading port ready to take on board her cargo. Here the bark, if she had started from Madras, might have never arrived at her loading port in safety.

[Sir Robert Phillimore referred to the *Parana* (7).]

In giving the plaintiffs demurrage for sixty-five days the Registrar took into consideration that the bark was lying idle for that time without employment. If, in addition to this, the plaintiffs receive damages in respect of the loss of the charter, they will receive more than they would have received if their vessel had been able to proceed to the loading port named under the charter.

Phillimore, in reply.

Cur. adv. vult.

(1) Law Rep., 10 C. P., 300.
(2) Law Rep., 6 Q. B., 199.
(3) 6 Bing., 716.
(4) Law Rep., 8 Ex., 221.
(5) 11 C. B. (N.S.), 142; 31 L. J. (C.P.), 105.
(6) 3 H. & N., 395; 4 H. & N., 350; 27 L. J. (Ex.), 427; 28 L. J. (Ex.), 184.
(7) Ante, p. 452.

1876 The Star of India.

Aug. 1. SIR ROBERT PHILLIMORE: The Cheviot, a vessel of 494 tons, was run into on the 1st of May, 1875, while at anchor in Madras Roads by the Star of India. This vessel admitted her liability, and the usual reference was ordered to the Registrar, assisted by merchants, to ascertain the amount of damages. On the 27th of March, 1876, the Registrar made his report, in which all the items of the plaintiffs' claim were allowed except one: each party to pay his own costs. The item not allowed was for the loss of a beneficial charterparty estimated at £583 18*s.* 9*d.*; the whole of this sum was disallowed. Against this ruling, and against that which left each party to pay his own costs, the owners of the Cheviot have appealed. The case has been ably and carefully argued before me. The following averments in the petition are proved or admitted: [His Lordship here read paragraphs (*a*) to (*e*) of the third article of the petition in objection.] The clauses of the charterparty to which it is necessary to refer are the following: "Twenty-five working days are to be allowed the charterers or their agents (if the ship be not sooner dispatched) for 470] loading the said *ship on the Coromandel coast, to commence twenty-four hours after the captain has given notice in writing to the charterers' agent that he is ready to receive cargo, and ten days on demurrage over and above the said laying days at 120 rupees per day, to be paid to the master day by day as due, at his option. Time occupied in changing ports not to count as lay days. Lay days not to commence before the 10th of April, 1875. Charterers to have the option of cancelling this charterparty if the vessel do not arrive at first loading port, and be ready to take in cargo by the 10th of May."

The main ground upon which the Registrar founded his rejection of the item of the loss of the beneficial charterparty, and which has been insisted upon in the argument before me, was that the claim for damages on this account was too remote. This was the main ground; but the Registrar appears also to have holden that the proximate cause of the loss was the option given by the charterparty to the charterers, and which they exercised by cancelling the agreement, because the ship did not arrive so as to be ready to take in cargo by the 10th of May.

I may dispose of this latter question first. I am unable to see how the granting of this option, which it was perfectly competent for the owners of the Cheviot to make, can be in any legal sense considered the real or proximate cause of the loss. But for the damage, there is every presumption

that the Cheviot would have arrived in proper time, and that there would have been no opportunity given for the exercise of the option.

With regard to the main objection of remoteness, it has been contended that the ordinary length of the voyage from Madras to Gopalpore was six days; and, though it is admitted that the ship had three days over the time necessary for the accomplishment of it, and that at the time the collision happened, according to the evidence of the captain, the Cheviot "was ready to proceed to Gopalpore, which was the first port she had to proceed to on the Coromandel coast to load, and at the time the collision happened we were actually heaving short on board the Cheviot, for the purpose of getting under weigh for the purpose of proceeding to the said port of Gopalpore." The voyage may therefore be said to have begun, but it is contended that, nevertheless, the ship might have met with some perils before she arrived at her loading *port—might have [471 been lost, or at least delayed by bad weather, and that all the plaintiffs can be said to have lost was the chance of performing the charterparty, which is too remote an item to be taken into account in the consideration of compensation. The answer to these objections appears to me to be that, though they may avail to show that the whole sum which represents the loss of the beneficial charterparty cannot be claimed, but that a certain deduction should be made from it, they do not avail to show that the item should entirely be struck out.

With respect to various decisions which were cited relating to cases of insurance contracts and the like, I must observe that this is the case of compensation demanded from a wrongdoer, and governed by different principles of law. In the case of *The Halley* (1), I said what I must now repeat:

I gladly avail myself of Dr. Lushington's language in this matter in a case in which he distinguishes (speaking of the duty of the Registrar and merchants as referees of the High Court of Admiralty) between cases of collision and cases of insurance. "One," he—Dr. Lushington—says, "of the principal and more important objctions to the report under consideration is this, that the Registrar and merchants, in fixing the amount to be paid for repairs, and the supply of new articles in lieu of those which have been damaged or destroyed, have deducted one third from the full amount which such repairs and new articles would cost. This deduction, it is said, has been made in consideration of new materials being substituted for old, and is justified upon the principle of a rule which is alleged to be invariably adopted in cases of insurance. The first question, then, which I have to consider is the applicability of the rule in question to a case of the present description; and this question, it is obvious, involves a principle of considerable importance, not only as regards the decision in this

(1) Law Rep., 2 A. & E., 3.

particular case, but as establishing a rule for assessing the damages in all other similar cases. Now, in my apprehension, a material distinction exists between cases of insurance and cases of damages by collision, and for the following reasons;" and then the learned judge explains the nature of an insurance contract, and he continues: "With regard to cases of collision, it is to be observed that they stand upon a totally different footing. The claim of the suffering party who has sustained the loss arises, not *ex contractu*, but *ex delicto* of the party by whom the damage has been done, and the measure of the indemnification is not limited by the terms of any contract, but is coextensive with the amount of the damage. The right against the wrongdoer is for a *restitutio in integrum*, and this *restitutio* he is bound to make without calling upon the party injured to assist him in any way whatever. If the settlement of the indemnification be attended with any difficulty (and in those cases difficulties must and will frequently occur) the party in fault must bear the inconvenience. He has no right to fix 472] this inconvenience *upon the injured party, and if that party derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden which the law will not place upon him."

In the more recent case of *France* v. *Gaudet* (1), the distinction, between an action of contract for the recovery of damages and an action against a wrongdoer, appears to have been very clearly taken. Lastly, it has been contended that the grant of demurrage in this case of 4*d.* per ton per day from the 1st of May to the 4th of July—sixty-five days—put an end to any claim founded on difference of freight, and includes the profitable employment of the ship during that time: that 2*d.* per ton covers the expenses, and the other 2*d.* per ton compensates the non-use of the capital. I am not of opinion that on those accounts the claim founded on the difference of freight is extinguished. It is not merely the beneficial charterparty which is lost, but also the sixty-five days during which the vessel has not been beneficially employed; and upon the whole I am of opinion that I must refer this matter again to the Registrar, with the assistance of merchants, to report upon what may be, in the circumstances, according to their opinion, a compensation for the loss of the beneficial charterparty. The whole sum, viz., £583 18*s.* 9*d.*, ought not to be granted, and, indeed, is not claimed. Among the deductions from that sum will have to be considered the difference between a voyage from Madras to London, and from the Coromandel coast to London; the saving of what is called wear and tear to the vessel, and the uncertainties and perils incident to all sea voyages. Other circumstances justifying deductions will, perhaps, suggest themselves to the great experience of the Registrar and merchants, as to which I have no desire to fetter their discretion.

The judgment which I now deliver is that the item for the loss of the beneficial charterparty, which, as being too

(1) Law Rep., 6 Q. B., 199.

remote and uncertain, has been disallowed, ought to be considered and allowed, subject to all just and reasonable deductions.

Solicitors for plaintiffs: *Lowless & Co.*
Solicitors for defendants: *Saxton & Son.*

[1 Probate Division, 473.]

March 15, 1876.

*THE CARGO EX SCHILLER. (7353. 7354. L. 11.) [473

Salvage—Salvage Services rendered in saving the Lives of Passengers in Danger—Right of Life Salvors to arrest Cargo recovered by Divers subsequently to Services in respect of which Salvage Remuneration is claimed.

A German steamship was wrecked in British waters and the lives of ten of her passengers were saved by the crews of a pilot cutter and three gigs. Subsequently divers, employed by the owners of the cargo of the steamship, succeeded in recovering from the wreck a large amount of specie. A cause of salvage was instituted on behalf of the owners and masters and crews of the pilot cutter and the gigs against the specie:

Held, that the plaintiffs were entitled to be paid salvage remuneration out of the proceeds of the specie.

THESE were consolidated actions of salvage instituted on behalf of the owners, masters, and crews of the pilot cutter Rapid and the boats, O. and M., Guinevre, and Swift, all of the Scilly Islands, against certain cargo, lately laden on board the German steamship Schiller, and against the owners of such cargo.

The statement of claim delivered in the consolidated actions in the first twenty-two paragraphs narrated the circumstances under which, on the morning of the 8th of May, 1875, the Rapid, the Guinevre, and the O. and M. had started from the island of Saint Agnes, and the Swift from the island of Bryer, and the plaintiffs on board, twenty-five in all, had succeeded in saving the lives of ten persons, who had been passengers on board the Schiller when that vessel was wrecked on the night of the 7th of May, 1875, on the Retarrier Reef, about three quarters of a mile southeast by east of the Bishop's Rock lighthouse, and were picked up in an exhausted state, two out of broken lifeboats belonging to the Schiller, the remainder whilst floating in the water near the place where the wreck had occurred.

It also appeared from other allegations in the same paragraphs in the statement of claim, that, after the passengers had been rescued, they were taken in safety to the island of St. Mary, and that the news of the disaster to the Schiller

was first made known at that island by the plaintiffs, from whence other and further assistance was dispatched, and to two fishing boats, who saved five lives.

474] *The 23d paragraph of the statement of claim was in terms as follows: A small portion of the stores and hull of the Schiller have been saved. The total value of the property saved is £40,000.

From answers to interrogatories, it appeared that, since the salvage services had been rendered, the crew of the O. and M. had received the sum of £75 from three of the passengers they had rescued, and that, long after the institution of the consolidated actions, the vice-consul of the German government at Scilly had paid £1 to each of the four men who had formed the crew of the Swift. With the exception of these sums no remuneration whatever in respect of the services they had rendered had been received by any of the plaintiffs.

The statement of defence alleged, *inter alia*, as follows:—

1. The defendants admit the statements of fact in articles 1 to 22, both inclusive, of the statement of claim.

2. The services of the plaintiffs to the passengers of the Schiller were rendered at some risk to themselves, but not at great risk.

3. The said passengers were not the owners of the cargo proceeded against in this action, and the plaintiffs rendered no services to, and did not attempt to save, the said cargo or the owners thereof. Such cargo was saved under the circumstances in the next article mentioned.

4. Some time after the wreck of the Schiller, and after the vessel was partially broken up and, with her cargo, had sunk in deep water and had been abandoned by all concerned, the defendants determined to endeavor to raise six barrels of specie belonging to them, and which were known to be in the vessel's hold. The defendants thereupon engaged a staff of divers and workmen, and worked for many weeks at great expense and with great uncertainty as to the success of their operations. During this time, and so long as it remained doubtful whether the operations would not be altogether unprofitable, the plaintiffs did not profess to be interested in or to have a claim against the cargo in respect of which the operations were proceeding.

5. After many weeks of unsuccessful and unremunerative operations, the defendants succeeded in raising four of the barrels of specie and a portion of the contents of another barrel, of the total value of £40,000, and the specie so saved

was conveyed to Penzance. This specie is the cargo proceeded against in this action.

8. Numerous portions of the Schiller, and of her tackle, apparel and furniture had been saved and recovered by persons other than the defendants prior to the commencement of these actions, but the plaintiffs made no attempt to enforce a claim against such property.

9. The plaintiffs respectively have received, or are entitled to receive, and can upon application receive from the passengers to whom they rendered the said services, and from the owners of the Schiller, and from the German Government, ample remuneration for their said services.

*10. The Schiller, at the time of her loss, was a [475 German ship, sailing under the German flag, and by the law of Germany, the ship and the owners thereof and the passengers themselves are liable for the remuneration of the services in the statement of claim mentioned, and the defendants, as owners of the cargo on board the said vessel, are not in the circumstances aforesaid liable for such remuneration.

The reply contained, *inter alia*, the following allegations:—

1. It is not true, as stated in the 4th paragraph of the statement of defence that, during the time therein mentioned, the plaintiffs did not profess to be interested in or to have a claim against the cargo therein mentioned.

3. It is not true that any portion of the Schiller, or of her tackle, apparel, or furniture, which were or are of any appreciable value, had or have been saved or recovered.

4. It is true, as stated in paragraph 10, that the Schiller was, at the time of her loss, a German ship sailing under the German flag, but with this exception, the several allegations in paragraphs 9 and 10 are untrue.

5. At the time of the render of the services stated in the statement of claim, the Schiller was a ship stranded or in distress on the shore of a sea or tidal water situate within the limits of the United Kingdom, and the services so stated were rendered wholly or in part in British waters.

March 13. The case came on for argument. No witnesses were called, but it was admitted that the services had been rendered in British waters.

The Admiralty Advocate (Dr. *Deane*, Q.C.) and *W. G. F. Phillimore*, appeared for the plaintiffs: They referred to 17 & 18 Vict. c. 104, s. 458; 25 & 26 Vict. c. 63, s. 59; order in council of the 7th of April, 1864, extending the provisions

of the Merchant Shipping Acts as to life salvage to Prussian ships: *The Johannes* (1); 24 Vict. c. 10, s. 9; *The Willem III* (2); *The Fusilier* (3); *The Cairo* (4).

Butt, Q.C., and *Lodge*, for the defendants, contended that the provisions of the statutes regulating life salvage were not such as to entitle the plaintiffs to proceed against cargo which had been recovered, long subsequent to the services rendered by the plaintiffs, by agents employed for the purpose by the owners of the cargo.

Cur. adv. vult.

476] *March 15. SIR ROBERT PHILLIMORE: This is a suit for salvage brought by a pilot cutter and some small boats against a portion of the cargo recovered from the North German ship Schiller, which went to pieces not long ago off the Scilly Islands.

The suitors are the Rapid, a pilot cutter, valued at £500, with a crew of eight hands on board her; the O. and M., a six-oared gig, of the value of £40, with six hands on board her; the Guinevre, a six-oared gig, also of the same value, with seven hands, including Stephen Hicks, her coxswain; and the Swift, a boat belonging to the island of St. Agnes, with a crew of four hands, including her coxswain, Uriah Legg.

It appears that, on the 7th of May last year, shortly before midnight, they heard the whistle of a steamer and the report of a gun at the island of St. Agnes, and there was at that time a very dense fog over the whole of the Scilly Islands. It appears that, nevertheless, suspecting that some vessel might be in danger, the crew of the O. and M. started from the island of St. Agnes towards what is called the Western Rocks. The crew of the Guinevre put off and proceeded in the same direction.

The weather at the time continued densely thick with fog; the wind was from the S.W., and a very heavy sea was running through the rocks and breaking over the sunken ledges, between which the boats had to pass before they could get outside, to such an extent as to greatly imperil the lives of those on board them. All these facts seem to be admitted with the exception of one—the greatness of the danger, as to which the admission is qualified; for the defendants say, though there was some danger, there was not very great danger.

The wind increased as they went on. The fog shut out all landmarks, and, notwithstanding that many of them

(1) Lush., 182.
(2) Law Rep., 3 A. & E., 487.
(3) Br. & L., 341.
(4) Law Rep., 4 A. & E., 184.

were licensed Trinity pilots, they had great difficulty in making their way.

One of the men, being on the island of Bryer, saw three spars wash on shore and some broken deck planks, and, summoning the crew of the Rapid, he got under way and passed down the channel between the islands of Samson and Bryer, with some difficulty. The statement of claim then goes on to state that Uriah Legg, who was on the look-out hill above Smith's Sound on the island of St. Agnes, between six and seven on the same morning, saw a *broken [477 ship's lifeboat drifting to the southward with something dark in it, which he could not distinguish for the fog, and immediately launched the Swift and went in the direction of the lifeboat, and rowing up to her, found that she belonged to the Schiller, and that there was lying in her a passenger groaning, benumbed with cold, and in a very weak state. The lifeboat was very much damaged, one-half of her port side being clean gone. She was floating on a level with the water, and the passenger was immersed in water except his head and shoulders, and he had lost all power of speech. They took him on board and took all proper measures to restore him to animation. In the meantime, the other boats were going to the wreck of the Schiller, and the statement of claim goes on to show that they went in the direction of the cries between the rocks which are called Mincarlo and Minalto, the channel between which is filled with sunken rocks and ledges, and saw one man floating on the water, and, going on, saw another man, whom they rescued. It appears that the Rapid made some tacks to see if there were any men floating on the water, but not seeing any, and finding the men they had got required care, they rowed to St. Mary's for medical assistance. Whilst so proceeding they passed quantities of boxes, clothes, and trunks, which they did not stop to pick up, being anxious to obtain assistance for the two men. I mention that fact because it is not disputed and appears to me really to the credit of the salvors. They then rowed through a quantity of wreckage and eventually saved six men; and upon the whole they saved ten lives themselves, and may be considered as indirectly saving more, because they made use of a steamboat which was going to Penzance, and sent word of the distress and danger in which the other men were, and some of those men were saved on board the steamer.

Now a question of law has been raised with respect to these services, and, first of all, it has been contended that the cargo is not liable to pay any salvage remuneration for

the saving of the lives of these people. It is admitted that no part of the cargo or the ship was saved by the salvors, and their claim is rested exclusively and entirely on the preservation of human life. It was admitted that this question had been much discussed in the case of The Fusilier, both in the High Court of Admiralty and in the Judicial
478] *Committee of the Privy Council, and that an adverse decision had been come to in both these courts, but it was pressed upon me that the decision might be erroneous and might be reviewed before another tribunal. I will quote shortly from that case, which is to be found in the 3d vol. of Moore's Privy Council Reports (N.S.), p. 51. In that case my learned predecessor, in delivering the judgment of the Court of Admiraly, said,—"Several questions of law have arisen respecting what is called life salvage, and to these questions I will address my attention before considering the particular facts of the case. First, then, as to the old law respecting salvage of life when not connected with the salvage of property—the law before any statute was passed on the subject. There is, I apprehend, no doubt that the law was that where no ship or cargo had been salved, no property rescued from destruction, but lives had been saved from the ship, no suit for salvage reward could be maintained. One reason for this state of the law was that no property could be arrested applicable to the purpose. There could be no proceeding *in rem*, the ancient foundation of a salvage suit. It is true that an anomalous case did sometimes arise where one set of salvors exclusively salved life and another, wholly distinct, salved the ship and cargo; but, even in these circumstances, the salvors of life alone could not render the property amenable to their claims. Then, as to the case where life and property had both been salved by one set of salvors, it was the practice of the court to increase the amount of salvage which would have been given if property only had been saved, and such doctrine does, I think, rest on too high authority to be doubted. The practice, too, was that all the property salved should pay in such increased rate of salvage—the ship, the freight, and the cargo, each in proportion to its value. Such being the state of the law and the practice of the court, the question arises, what was the grievance which required the interposition of the Legislature? That grievance clearly was, that persons who had risked their own lives perhaps and salved life only, or with so little property as not to afford the payment of an adequate reward, could not be justly compensated. That was the grievance in-

tended to be remedied. No doubt the leading motive for a legislative enactment to remedy this grievance was to encourage the salving of life, but there was *a subsidi- [479
ary ground, the encouragement of salvors generally; for reward of life salvage operates as a further incentive to salvage exertions. This being so, it would be reasonable to suppose *à priori* that the remedy given by the Legislature would be commensurate to the evil and effect no further change."

And then the learned judge enters into a consideration of the sections of the Merchant Shipping Act (17 & 18 Vict. c. 104), both of s. 458 and of s. 459, and he comes to the conclusion that the cargo was clearly liable to pay the life salvage.

The matter was argued on appeal before the Privy Council, and I had the honor, I think, of appearing for the appellants, Dr. Deane appearing for the respondents.

The question was very fully gone into indeed and very carefully considered in the Privy Council, and Lord Chelmsford delivered judgment, and said: "The general rule as to the parties liable to pay salvage is that the property actually benefited is alone chargeable with the salvage recovered. But this rule is inapplicable in the case of life salvage, because it is difficult to imagine a case where the saving of the lives, either of the crew or of the passengers of a vessel in distress, would be of any benefit either to the vessel or to the cargo. The Legislature, therefore, could not have intended that the benefit to property should be the criterion of the liability to the payment of life salvage. All that seems to have been contemplated is that there should be included in the entire sum payable for salvage of ship and cargo a distinct reward for the preservation of human life." Then his Lordship goes into the question of the 458th section of the Merchant Shipping Act, which was much discussed before me, and says: "The Legislature seems merely to have had in view the rewarding at a higher rate persons whose services were more meritorious from having rescued human life as well as property from peril, and almost to have assumed that the liability to the salvage would attach without any distinction upon all the owners of property exposed to the common danger." And then entering into a consideration of the 468th and 469th sections of the statute, as removing any doubt that the previous section might have created on this point, his Lordship ended the judgment by saying: "The object of the Legislature in the different sections referred to seems to have been to give a *legislative [480

sanction to the practice of the Court of Admiralty of indirectly rewarding salvors for the preservation of human life by allowing the value of their services to be made the subject of a distinct estimate, but without intending to fix the responsibility of payment upon one class of owners of the property involved in the common peril more than on another."

Now it has been contended, as I have already observed, that these judgments are erroneous, and would be reconsidered and perhaps reversed before another tribunal. I am not of that opinion myself, but I am clearly of opinion that if I were, it would be improper in me to give a judgment in any way at variance with the decision of my predecessor and the Privy Council in this matter, and I decline to do so. It is then contended that there is a distinction between this case and *The Fusilier* (1), namely, that in this case the cargo was saved afterwards by the owners, and there was no cargo saved at the time, as I understand the argument, when the lives of these passengers were saved. Now, I confess I am unable to follow any distinction in principle between the case of *The Fusilier* (1) and the case now before me. The argument that it is not a case for salvage reward because the owners saved the property afterwards seems to me untenable. The value of the property saved, no doubt, by the owners themselves, in this case amounted to about £40,000 in specie. I think that cargo so saved was liable, under the statute to which I have referred, in accordance with the principles of the judgment I have adverted to, to pay salvage remuneration to those who saved the lives on board the vessel, by whomsoever that property was saved, whether by another set of salvors, or whether saved by the owners, as alleged in this case. I am of opinion, therefore, that the judgment in *The Fusilier* (1) binds me, and that I must follow it on the present occasion, and it remains only to say what amount of remuneration the court ought to award. The property is very large, £40,000, but the services, though very efficient, were not long or accompanied with much danger—although, I think, with some danger—to the parties performing them. They lasted between three and
481] four hours: and there is no doubt whatever *that the lives of these people would have been irretrievably lost but for the exertions of these men.

I have already spoken with the praise which I think the plaintiffs deserve for their hastening to save human life and disregarding portions of the cargo which might have been

(1) 3 Moo. P. C., 51; B. & L., 341.

valuable to them had they saved them; and I need not refer to that again. It has been said they have received £75; but, looking to the affidavit in answer to the defendants' interrogatories referred to, I think that sum must be considered as not having been paid by the cargo, but by the passengers, who were naturally prompted to give a reward out of their own pockets to those who had saved their lives.

There were four boats of the value I have described, and the number of men I have mentioned, and I think I shall make a fair award if I allot £500 to all the boats in this case.

Solicitors for plaintiffs: *Lowless & Co.*
Solicitors for defendants: *Waltons, Bubb & Walton.*

CASES

DETERMINED BY THE

CHANCERY DIVISION

OF THE

HIGH COURT OF JUSTICE,

AND BY THE

CHIEF JUDGE IN BANKRUPTCY,

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

LUNACY.

[3 Chancery Division, 209.]

V.C.M., July 21, 1876.

209] **In re* WALKER'S MORTGAGE TRUSTS.

Trustee Act, 1850, *ss.* 2, 10—*Joint Mortgage—Outstanding Legal Estate—Former Trustee.*

One of three joint mortgagees, who were trustees, went abroad, and in his absence the mortgage was paid off, and by a deed, to which he, with the other trustees, was named a party, but which he never executed, the debt and security, except the legal estate outstanding in him, were vested in the transferee of the mortgage. Afterwards a new trustee was by deed appointed a trustee in his place:

Held, that the neglect or refusal of the old trustee to convey the outstanding legal estate brought the case within the Trustee Acts, and that the court had jurisdiction under those acts to vest in the transferee the outstanding legal estate.

In re Osborn's Mortgage Trusts (1) distinguished.

THIS was a petition under the Trustee Acts.

The Rev. Jonathan Dawson died on the 29th of January, 1855, having by his will, dated the 2d of April, 1853, given

(1) Law Rep., 12 Eq., 392.

his real and personal estate to his wife (who afterwards became Mrs. Longley), and Thomas George Pearse and Richard Roger Western upon certain trusts.

By way of investing a sum of £6,700, part of the testator's estate, on real security, the trustees, by a deed of the 29th of July, 1863, took a transfer from a Miss Elizabeth Walker, with the concurrence of the persons entitled to the equity of redemption, who were parties to the deed, of a mortgage of real estate for that amount, then vested in Miss Walker, whereby the legal estate became vested in the trustees.

On the 6th of March, 1866, the trustees of the will gave notice to the mortgagors to call in the mortgage, and shortly afterwards, in the same month of March, 1866, Thomas George Pearse left England to reside in the United States of America.

By a deed of the 26th of February, 1867, indorsed on that of the 29th of July, 1863, and expressed to be made between Mr. and Mrs. Longley and Messrs. Pearse and Western of the one part, and Thomas Griffiths Powell, one of the petitioners, of the other part, the debt and security were assigned to Powell, by whom the *principal sum and [210 all arrears of interest had been previously paid off. This deed was executed by Mr. and Mrs. Longley and by Mr. Western, and the indorsed receipt was also signed by them, and the deed was duly acknowledged by Mrs. Longley. But it was not executed, nor the receipt signed, by Pearse, who refused to concur.

By a deed of the 18th of March, 1867, Robinson Fowler was appointed a trustee of Jonathan Dawson's will in the place of Pearse, and the £6,700 was invested in the names of the new trustees.

The present petition was presented by Powell, and the mortgagors and the persons interested in the money advanced by Powell. It stated the above facts, and also alleged that Pearse wilfully declined to execute the conveyance, and that, although he was believed to be in England, his address was unknown to the petitioners. The petition was entitled in the matter of the Trustee Acts, and asked that an order might be made vesting in Powell the lands and hereditaments comprised in the indenture of the 29th of July, 1863, for all the legal or other estate or interest in one undivided third or other part or share vested in Pearse under the same indenture, and subject to the trusts and equities subsisting thereunder affecting the same.

Reginald Hughes, in support of the petition: A difficulty has been suggested in this case from the decision in *In re*

Osborn's Mortgage Trusts (1), where it was held that a legal estate outstanding in a mortgagee was not within the provisions of the Trustee Acts. But it is submitted that the present case comes within the exceptions mentioned in the judgment in that case. It is intended to transfer the mortgage, and the transferee requires the outstanding estate to be got in.

W. E. M. Tomlinson, for the respondents, who were the present trustees of Dawson's will, and the beneficiaries under the will, consented.

MALINS, V.C.: I understand that the transferee will be 211] satisfied if I make the *order asked for by the petition. I think the case is within the act, and I will make the order prefaced by the words, "The Court being of opinion that Thomas George Pearse is a trustee of the legal estate vested in him by the indenture of the 29th of July, 1863, for the petitioner Edward Griffiths Powell within the meaning of the Trustee Acts."

Solicitors: *Duncan, Murton, Warren & Gardner; Emmets & Co.*

(1) Law Rep., 12 Eq., 392.

See 11 Eng. Rep., 646 note.

Upon a conveyance in trust, the deed is the source and limit of the powers, duties and rights of the trustee and *cestui que trust*. There is no inherent right in the creditor secured by trust deed to appoint a new trustee. It is only by express authority conferred on the *cestui que trust* to name another trustee that such power can be exerted: Clark *v.* Wilson, 53 Miss., 119.

If the trustee dies, becomes unable, or declines to execute the trust, and no provision is made for a successor, the vacancy can only be filled by the Court of Chancery, which never permits the trust to fail because the appointee of the grantor cannot or will not execute it: Clark *v.* Wilson, 53 Miss., 119.

When a power is granted, the authority should designate the person by whom, as well as the event or circumstances upon which, it may be exerted. If a person not named or distinctly described by his office or character makes the appointment, or if the circumstances do not warrant it, or there be serious irregularities in executing the power, in all these cases the acts done by the new appointee will be invalid, and the original trustee will not be exonerated or discharged: Clark *v.* Wilson, 53 Miss., 119.

A power is annexed to the estate when the donee has an estate in the land, and the estate to be created by the power is to, or may, take effect in possession, during the continuance of the estate to which it is annexed, as the power to a tenant for life to make leases. A power in gross is where a person to whom is given an estate, but the estate is not to take effect, under the power, until after the determination of the estate to which it relates. Coke Lit., 298. A power to the mortgagee is an example of the former kind; being annexed to the estate, it is not personal, or in gross, and would not terminate at the death of the mortgagor: Clark *v.* Wilson, 53 Miss., 128.

The Supreme Court has power, *upon petition*, to remove as trustee one upon whom by the terms of a will naming him executor, as such executor an express trust is conferred; and this, although he has not completed his duties as executor: Quackenboss *v.* Southwick, 41 N. Y., 117; People *v.* Norton, 9 N. Y. 176; Wood *v.* Brown, 34 N. Y.,

337, 340; Proudfoot *v.* Tiffany, 11 Grant's (U.C.) Chy., 461; Gray *v.* Hatch, 18 id., 72.

This is a general authority, independent of statute, and may be exercised whenever good cause for removal is shown: People *v.* Norton, 9 N. Y., 176; Matter of Mechanics, etc., 2 Barb., 446; Bishop *v.* Houghton, 1 E. D. Smith, 571–2; Matter of Bull, 45 Barb., 337; Tripp *v.* Marten, 9 Grant's (U.C.) Chy., 20; Lyon *v.* Radenhurst, 5 Grant's (U.C.) Chy., 544; Sparhawk *v.* Sparhawk, 114 Mass., 356.

The removal of such a trustee is proper, where the relations between him and his co-trustee are such, that they will not probably co-operate in carrying out the trusts beneficially to those interested, and a majority of the beneficiaries ask for such removal. And it is not very material to inquire how such relations originated, or whether the trustee, whose removal is sought, caused them by his own misconduct, or not, unless such inquiry should of itself disclose that the conduct of one had been such as to render him disqualified to act as trustee. It is sufficient to ascertain the fact, to warrant the removal of one and the appointment of another in his place, to secure the faithful performance of the trust: Quackenbush *v.* Southwick, 41 N. Y., 117, 122; Wood *v.* Brown, 34 N. Y., 337, 340.

When the trustee named in a deed of trust to secure the payment of a promissory note, with power in the trustee to sell the land if the note is not paid, dies, the person who created the trust and the note is a necessary party to an original bill in equity for the appointment of a new trustee, though the person who executed the trust deed have conveyed away his remaining estate and interest in the premises, but continued to be liable for the payment of the note, because he is interested in the appointment of a proper person to sell the property in such manner as not unnecessarily to cause a deficiency: Holden *v.* Stickney, 2 MacArthur, 141.

Though the appointment of a new trustee cannot be attacked collaterally on account of a defect of parties: Rice *v.* Brown, 77 Ills., 549.

The court may remove trustees and receivers for insolvency, but is not bound to do so. An application for a removal on such ground should be denied where it appears that there is no other valid objection, and the insolvency existed and was known to the parties previous to the appointment: Paddock *v.* Palmer, 6 How. Pr., 215.

See Gray *v.* Hatch, 18 Grant's (U.C.) Chy., 72.

A trustee under a mortgage given to secure the payment of debts of the mortgagors has no right to compel the *cestui que trust* to wait his pleasure in foreclosing the mortgage; or to coerce them to afford facilities to the debtor, to raise the means to pay the debts. His attempting to do so is a clear violation of the trust: Matter of Mechanics, etc., 2 Barb., 446.

A trustee who mingles trust funds with his own, withholding information from the *cestui que trust* as to the investment of them, will be removed, though he is the testator's son and the father of the *cestui que trust*, and though the will directs him to pay them the income from time to time as he thinks best, and exempts him from giving bonds: Sparhawk *v.* Sparhawk, 114 Mass., 356.

Though the court cannot remove an executor, as such merely, it may interfere to regulate his conduct and direct the mode as to which he shall operate with his co-executor in discharging his duties as executor under the will. So a surrogate may interfere either at the suggestion of the co-executor, the creditors or legatees, in case the defendant refuses to perform any duty which the law casts upon him and which is necessary to be done to preserve the estate: Wood *v.* Brown, 34 N. Y., 342.

The Court of Chancery whenever it has power to remove a trustee has power to appoint another in his stead: People *v.* Norton, 9 N. Y., 176; Matter of Mechanics, etc., 2 Barb., 446; Wood *v.* Brown, 34 N. Y., 341–2; Matter of Bull, 45 Barb., 336–7; Proudfoot *v.* Tiffany, 11 Grant's (U.C.) Chy., 461; Tripp *v.* Marten, 9 id., 20; Rice *v.* Brown, 77 Ills., 550.

Though it may authorize the remaining trustees to perform the duties of trustees: Matter of Bull, 45 Barb., 337.

As to when a power is personal and can only be exercised personally by the person upon whom it is conferred, see

Clark *v.* Wilson, 53 Miss., 119, 128–132; Lyon *v.* Radenhurst, 5 Grant's (U.C.) Chy., 544.

See Sparhawk *v.* Sparhawk, 114 Mass., 356.

As to whom a sale will be held to have been under a trust deed and not under a foreclosure: Rice *v.* Brown, 77 Ills., 549.

As to a sale under a direction to post in four public places: Rice *v.* Brown, 77 Ills., 549.

[3 Chancery Division, 211.]

V.C.M., July 25, 1876.

EVANS v. WALKER.

[Filed in 1816.]

Will—Perpetuity—Annuity or Absolute Interest.

A testator gave to A. B. an annuity of £50 per annum for her life, and after her decease to the children she might have, born in wedlock, equally to be divided between them during their lives, and after the decease of the survivor to go to his nephew and his two nieces equally between them. A. B. having died without issue:

Held, that the gift to the nephew and nieces was not void for remoteness, and that they took the capital from whence the annuity proceeded absolutely, in equal shares as tenants in common.

JOHN BROWN, by his will, dated the 13th of February, 1812, made the following disposition of his property: "I give and bequeath unto Maria Evans £50 per annum from the day of my decease during the term of her natural life, and from and after her decease to the children she may have born in wedlock, equally to be divided between them, share and share alike, during their natural lives, the said annuity to be paid half-yearly; and from and after the decease of the survivors herein named to go to my nephew Edwin Walker, and my two nieces, Sally Brown Walker and Eliza Walker, equally between them, and I hereby desire that my nephew and nieces will see it fulfilled. I declare this my last will and testament."

This suit was instituted in 1816 for the purpose of having a sum of money set apart out of the estate of the testator to answer the annuity of £50, and a sum of £1,666 13*s.* 4*d.* was accordingly paid into court for that purpose. Maria Evans 212] died without *having been married, in 1874. The nephew and two nieces of the testator died some time since, and a petition was now presented by their legal personal representatives to have the money paid out of court to them in equal shares.

W. Barber, and *De Castro*, in support of the petition: There are two questions raised upon this petition; first, whether the gift to the nephew and two nieces of the testator is void for remoteness; and, secondly, whether they take the annuity absolutely or only for life.

The first question is settled by *Ashley* v. *Ashley* (1), and your Lordship's judgment in *Stuart* v. *Cockerell* (2), where you said that property might be given to unborn persons for life with remainder over, provided the ascertainment of the persons to take in remainder was not postponed till after the death of such unborn persons.

The second question arose in *Stokes* v. *Heron* (3), where the testator gave annuities to his wife and his mother, and after their decease to be equally divided among his three children, and these were held to be perpetual annuities; and in *Bent* v. *Cullen* (4) it was held that a gift of £50 a year to the testator's wife for life, and afterwards the said £50 to his daughters and his granddaughter, or the survivors, was a gift in remainder of the principal, which would produce £50 a year.

We say, therefore, that the nephew and nieces are entitled to the absolute interest in the money from which the annuity proceeded.

[They also cited *Blewitt* v. *Roberts* (5), *Hicks* v. *Ross* (6), and Hawkins on Wills (7).]

Hull, for the next of kin of the testator: The gift of this annuity to the nephew and nieces of the testator is void for remoteness. It is to Maria Evans for life, and then to unborn children, and the gift over is not until the death of *the survivor of the unborn children. There is therefore an intestacy after the death of the children of Maria Evans, and the next of kin of the testator are entitled to the fund from which the annuity was provided. [213

Under any circumstances the legacy was only for the lives of the nephew and nieces, and they being dead the capital is undisposed of. The word "annuity" signifies a payment for life. No appropriation of the capital was contemplated. This was decided in *Lett* v. *Randall* (8), where there was an annuity given to the testator's wife, and after her decease to be equally divided among all his children then living, and the annuities were held to be limited to the lives of the widow and children; and there was a similar decision in *Cooke* v. *Bowler* (9).

MALINS, V.C.: The first point is, whether the gift to the nephew and two nieces of the testator is void for remoteness, and it is quite clear to my mind that it is not, because there is no objection to a gift to unborn children for life, and

(1) 6 Sim., 358.
(2) Law Rep., 7 Eq., 363.
(3) 12 Cl. & F., 161.
(4) Law Rep., 6 Ch., 235.
(5) Cr. & Ph., 274.
(6) Law Rep., 14 Eq., 141.
(7) Page 126.
(8) 2 D. F. & J., 388.
(9) 2 Keen, 54.

then to an ascertained person, provided the vesting is not postponed. That point I commented upon in *Stuart* v. *Cockerell* (1). Property may be given by will or secured by settlement to an unborn person for life, or to several unborn persons successively for life, with remainders over, provided that the vesting of the remainders, or the ascertainment of those who are to take in remainder, be not postponed till after the death of such unborn person or persons. Therefore the circumstance of there being life estates given to all the children unborn of Maria Evans does not create a perpetuity if there are persons capable of taking immediately, and here there are such persons. So they take immediate vested interests.

The next question is, what is the effect of this gift after the decease of the survivors of Maria Evans' children, "to my nephew Edwin Walker, and my two nieces Sally Brown Walker and Elizabeth Walker, equally between them." If he had intended them to take for life only, he would have used words similar to those used in the previous gift, 214] and that shows that they were not *to take for their lives, but to take absolutely. That is the construction I should put upon the will on principle, but the question is settled by the cases of *Stokes* v. *Heron* (2) and *Bent* v. *Cullen* (3). The latter case is almost identical with this, for there the testator gave to his wife £50 a year to be paid out of the interest, dividends, and produce arising from his personal property, and after her decease he gave the said £50 to his two daughters and his granddaughter or the survivors, and it was held to be a gift to the survivors of the principal, which would produce the annuity of £50. I, therefore, understand the law to be, that when there is a gift of an annuity to one for life, or to several for lives, and then a gift afterwards to another person, without any restriction, that means that the last taker is to have the capital from which the annuity was produced; consequently this annuity being given to the nephew and two nieces generally, without any words of restriction, they take the capital absolutely. The order will be: The Court being of opinion that the nephew and two nieces took the absolute interest in the capital equally as tenants in common, Let the fund in court be paid to their legal personal representatives,—that is to say, one third to the representatives of the nephew, and one third to the representatives of each of the nieces.

Solicitors: *Trinders & Curtis Hayward.*

(1) Law Rep., 7 Eq., 363. (2) 12 Cl. & F., 161. (3) Law Rep., 6 Ch., 235.

[3 Chancery Division, 228.]

V.C.B., May 25, 1876.

*Altman v. Royal Aquarium Society. [228

[1876 A. 72.]

Injunction—Covenant by Lessor of Stall in a Public Building that Lessee should have exclusive Right of Sale of specified Goods.

Where the defendants, owners of a public building, have contracted with the plaintiff, that he, renting a stall from them, shall have the exclusive right to exhibit and sell certain specified classes of goods, an injunction will lie against the defendants for permitting the exhibition and sale by other renters of stalls within the building of goods so specified.

Motion. By an agreement dated the 3d of July, 1876, and made between the defendants, the Royal Aquarium and Summer and Winter Garden Society, Limited, at Westminster, by William Wybrow Robertson, the managing director of the society, of the one part, and the plaintiffs, Lewis Joseph Altman and Harris Brown, trading as L. J. Altman & Co., thereinafter called the exhibitor, of the other part, the society agreed to let, and the exhibitor agreed to take, certain spaces in the Aquarium for the term of three years, from the 22d of January, 1876, at the rent of £325, payable by equal quarterly payments in advance, such spaces to be used by the exhibitor for the purpose and with the sole right of exhibiting therein and selling English and foreign china, glass and earthenware, chandaliers and lamps of all descriptions, with the exception of Venetian glass and terra cotta; and the sole right to sell and exhibit all descriptions of scents and perfumes within the company's premises. No goods or articles of any other description were to be exhibited therein or sold by the exhibitor without the permission in writing of the said society being first obtained. In case the exhibitor failed to pay the rent, or to observe and perform the regulations from time to time made by the directors, the society should have the power of putting an end to the agreement on giving seven days' notice in writing; but the exhibitor should, notwithstanding the agreement be so terminated by the society, remain liable for the rent to the end of the current year.

*The plaintiffs took possession of the stall, and [229 used it for the sale of china, glass, earthenware and other articles named in the agreement. The Aquarium was opened on the 22d of January. Finding that other exhibitors were exhibiting and selling china, glass and earthenware articles, the plaintiffs called the attention of the managing director

to the fact, but without redress; and on the 13th of May a writ was issued indorsed for specific performance of the agreement, for an injunction to restrain the sale of the goods, and for damages.

The plaintiffs now, on notice dated the 13th of May, moved that the defendants might be restrained from permitting, or neglecting to prevent, the exhibition or sale of English and foreign china, glass and earthenware, chandaliers and lamps (not being Venetian glass or terra cotta), by any other persons or person than the plaintiffs within the premises of the defendants.

From the evidence in support it appeared that the other exhitors who were exhibiting and selling china, glass and earthenware at the opening of the Aquarium, were named Wills, Marie Louise, the London Stereoscopic Company, and Fentum, who were still exhibiting, and two, named Ramsay and Mrs. Ryan, who had left.

Julia Cohen, a witness for the plaintiffs, deposed that she had bought at Wills' stall an earthenware flower-pot and stand, and a glass flower vase or tube; that at Marie Louise's stall she had bought a glass scent bottle; and at the stall of the London Stereoscopic Company a magnifying glass, and that articles similar to those she purchased were being exhibited. At the last mentioned stall other articles of glass were being exhibited.

In opposition, Bruce Phillips, the sub-manager of the society, deposed that since the opening the only person who had been permitted to expose or offer for sale in the building any china, glass, earthenware, chandaliers or lamps of any description, was the plaintiff Altman. He admitted that the plaintiff complained of Ramsay, to whom deponent gave notice, but Ramsay disputed the plaintiffs' right to object, on the ground that biscuit ware which he, Ramsay, was selling, was not china. Deponent further said that Ramsay, some two months before (viz., in March, 1876), had left the society's premises. Mrs. Ryan dealt only, deponent believed, in toys. The plaintiff objected to her ex-
230] hibiting a box *of playthings known as dolls' china. Mrs. Ryan had for some time left. Wills was a florist, and the only articles of glass or china exhibited in his stall were one or two ornamental flower-pots and some glass tubes for containing flowers. Madame Marie Louise was a jeweller, and did not sell or exhibit in the pfemises either glass, earthenware, or china, except that amongst the articles exhibited in her stall were a few silver-mounted scent or smelling bottles. The Stereoscopic Company did not exhibit or sell

any glass, earthenware or china, except magifying glasses for inspecting photographs.

William Francis Knight, secretary to the art department of the society, said that Fentum was a dealer in ivory ornaments, and the only glass articles exhibited by him were some small looking glasses set in ivory frames and some ivory watch stands having glass faces. The Stereoscopic Company, besides magnifying glasses, had some framed photographs, with glass placed over them.

Wills, florist, admitted selling cases for flowers made of Minton's tiling.

An assistant to Marie Louise deposed that the only glass articles sold or exhibited in the stall were a few silver or gilt-mounted smelling bottles. The stall was used for exhibiting jewelry, amongst which were some French brooches made of china.

In reply the plaintiff Altman said that biscuit meant unglazed china; that Ramsay had sold, besides unglazed china, majolica and *faience;* that Mrs. Ryan had sold china toys of different descriptions, and glass inkstands; and that Wills was exhibiting and selling ornamental tiles. Plaintiff admitted that he did not object to the exhibition by Madame Louise of a few expensive scent or smelling bottles, provided the same were mounted in gold or silver, and that the value consisted, not in the glass, but in the gold or silver mounting; but said that Madame Louise had been for some time exhibiting and selling scent bottles with plated and other very cheap mountings, the value of which lay in the glass and not in the mounting. Julia Cohen said that when she bought the flower-pot she did not buy any flowers, nor was she asked to do so.

Kay, Q.C., and *Jason Smith*, for the plaintiffs: The sub-manager does not say that he stopped any of the *sellings complained of by the plaintiff Altman. The [231 case is substantially unanswered by the defendants.

Swanston, Q.C., and *W. W. Karslake*, for the defendants: The plaintiffs keep what in common parlance is called a "crockery shop." Such a trade is not interfered with by the sale of any conceivable article that has any glass in its composition or construction. The court might, with equal justice, restrain the sale of a bottle of soda water, or of a watch. Half the "jewelry" in the kingdom is glass over paint. Is cheap jewelry within this agreement? Neither looking glasses, nor magnifying glasses, nor framed and glazed photographs, come under the description of crockery ware.

Covenants in restraint of trade will be construed reasonably: *London and North Western Railway Company* v. *Garnett* (1); *Josselyn* v. *Parson* (2).

Two of the persons complained of have left: as to them the cause of complaint is at an end.

The only instance of sale in breach of the covenant which has been proved is that of the one flower vase, which was sold to an emissary of the plaintiff, who persuaded the florist into selling her the article. Manufactured evidence of that kind is always viewed by the court with suspicion.

BACON, V.C.: In my opinion the plaintiffs are entitled to that right which the defendants have granted them by way of agreement.

I agree with Mr. Swanston that the terms of the agreement must be construed according to the common and ordinary sense and meaning of the words. [His Lordship read the words, and continued:] The defendants have the entire control over this exhibition, or bazaar, or whatever it is called, and they, for valuable consideration, have contracted with the plaintiffs that none but they shall have the right to sell these goods within the building. Then what sort of excuse is offered in the course of the argument for the sale by Ramsay, for example, of articles of biscuit, majolica, and *faience*? It is true that all such acts of selling are 232] now *over and gone; but the plaintiffs' complaint is, that when they remonstrated, their remonstrances were unheeded.

There are, in truth, no facts in dispute. The facts as to Wills, the florist, are that he not only sells flowers in glazed flower-pots, but that he has a sale of Minton's colored tiles for flower-pots and boxes; and it is to be observed that it is the defendants—they who ought to have protected the plaintiffs from breach of the agreement—who bring into court exhibited articles of their own selection, and ask the court to say whether the sale of such articles is a breach of the agreement. The plaintiffs cannot, of course, except by purchasing them, bring into court the articles which other persons not parties to the dispute are selling. But taking the defendants on their own showing, earthenware brooches are as much within the covenant as anything else made of earthenware; and though a very small article is produced, if made of earthenware, it is not the less within the agreement on that account.

As to the photographs, the selling of a magnifying glass,

(1) Law Rep., 9 Eq., 26. (2) Law Rep., 7 Ex., 127.

or the putting of a glass front to a photograph, can scarcely be called an infringement of this agreement.

But enough has been proved to show that the defendants have not been dealing fairly with the plaintiffs; that they have broken the contract they have entered into with them; and the consequence is, the defendants must be restrained from doing or permitting to be done anything in violation of the agreement.

There must be an injunction as moved for; and the costs of the motion will be costs in the cause.

Solicitor for the plaintiffs: *W. A. Plunkett.*

Solicitors for the defendants: *Pawle, Fearon & Coldham.*

[3 Chancery Division, 262.]

V.C.B., June 24, 1876.

**In re* SPEER'S TRUSTS. [262

Lands Clauses Act—Application of Purchase-money—Lateral Permanent Improvements—Enlargement of Dwelling house.

Purchase-money of part of a settled estate paid in under the Lands Clauses Consolidation Act ordered to be applied towards the cost of lateral additions to a house, part of the settled estate.

PETITION. By the will, dated the 10th of December, 1840, of William Speer, who died in 1844, certain copyhold hereditaments, held of the manor of Fulham, Middlesex, and certain freehold hereditaments in the city of Westminster, were devised in a line of strict settlement, under which Hannibal Speer (formerly Sandys) was entitled as tenant for life in possession, with remainder to his first and other sons in tail male, remainder to his brother Edward Frederick Sandys for life, remainder to the use of the first and other sons of Edward Frederick Sandys in tail male, with divers remainders over.

*Hannibal Speer had never been married. Edward [263 Frederick Sandys had three infant children, two daughters and a son.

Part of the copyhold property had been taken by a railway company, and the proceeds of sale were in court.

Hannibal Speer, Edward Frederick Sandys, his three infant children, and other persons interested under the limitations of the settlement, now presented a petition, stating that part of the freeholds in Westminster consisted of a freehold house, No. 1 Park Prospect, near Storey's Gate. This house was formerly occupied with No. 2 Park Prospect, from which it was now detached. No. 1 was well

situated, fronting towards the north on St. James's Park, but had limited accommodation and inferior kitchen offices, and was approached down a side entrance, exposed to the weather. It had no windows facing to the south in Great Queen Street, from which it was separated by a yard or garden, formerly let with No. 2. On this yard or garden it was proposed to erect a kitchen, scullery, larder, store room, and beer cellar, with a proper area to light the same, on the basement, a dining room with entrance hall and portico in Great Queen Street, together with a bed room, lavatory, and other conveniences on the first floor, and another bed room on the second floor. The effect would be to convert No. 1 from an inadequate and ill arranged house into a first class residence, which it was estimated would yield a return of £6 per cent. on the outlay, as rent.

They asked for the application of a competent part of the fund in court towards the execution of these works, which had been contracted for, subject to the leave of the court being obtained.

Phear, for the petitioners: The infancy of some of the petitioners renders the application necessary.

This is not a case of repairing, which it is the duty of the tenant for life to do; it is that of permanent improvement by the enlargement of a house by buildings erected upon adjoining land: *In re Leigh's Estate* (1); *Drake* v. *Trefusis* (2).

Macnaghten, for the Railway Company.

264] *Bacon, V.C.: There seems to be nothing to be said against this application.

The case appears to be covered by the decisions that have been referred to, especially *Drake* v. *Trefusis* (2).

In erecting new buildings, you are not repairing, you are doing something whereby a permanent increase of rent may be expected.

I think the application may be granted.

Solicitors: *Trollope & Winckworth; Hargrove, Fowler & Blunt.*

(1) Law Rep., 6 Ch., 887.

(2) Law Rep., 10 Ch., 364.

[3 Chancery Division, 269.]

V.C.H., April 1, 1876.

*BIZZEY v. FLIGHT. [269

[1874 B. 222.]

Incomplete Settlement—Confirmation by Will—Effect of—Non-admission of Settlement to Probate.

Where a settlement, incomplete as to part of the property comprised in it, is subsequently confirmed by the will of the settlor, the confirmation perfects the settlement, but as a testamentary instrument, so that the doctrines of ademption and lapse apply.

R. H., by a voluntary settlement, assigned to trustees several mortgage debts, certain shares in a bank, and some furniture, and directed the trustees to hold the premises and certain consols which had been previously transferred to them, upon trust for herself for life, and then, as to part of the trust premises, for specified beneficiaries; and as to the residue, for M. F.

M. F. died in the lifetime of the settlor, who in her lifetime received some of the mortgaged debts (the others being received by the trustees), and died without having duly transferred the bank shares, but having by her will confirmed the settlement. The settlement being valid as to the consols, the mortgage debts received by the trustees, and the furniture, but incomplete as to the mortgage debts received by the settlor, and the bank shares:

Held, that the confirmation could not operate as to the mortgage debts received by the settlor; but that, notwithstanding that the settlement had not been admitted to probate, the confirmation of it by the will, which had been proved, perfected the settlement with regard to the bank shares as a testamentary instrument, and operated as a specific bequest of them; and that the shares therein of *cestuis que trust* under the settlement, who predeceased the settlor, lapsed in favor of the residuary legatee under this will.

Observations on *Sheldon* v. *Sheldon* (1).

REBECCA HODGES, by a voluntary settlement dated the 5th of February, 1850, after reciting a transfer of a sum of consols to the trustees of the settlement, assigned to them certain sums of money secured on six several mortgages, and certain shares in the Gloucestershire Banking Company, and certain furniture and effects respectively specified in a schedule to the deed, and all deeds, writings, and securities whereby the same were secured; and for the better enabling them to recover the said moneys, she constituted the trustees her attorneys; and she directed them when and as any of the principal moneys comprised in the mortgage securities were paid off to invest the same, and, *during her [270 life, to pay the dividends and interest thereof, and of the other settled property to herself, and to permit her to use and enjoy the furniture and effects. And after her death to hold the trust fund upon trust to invest and pay certain sums of money, part thereof, in trust for specified *cestuis que trust;* and as to other sums, part thereof, for specified

(1) 8 Jur., 877.

charities; and as to the residue of the trust moneys, upon trust to pay the same to Martha Flight, her executors, administrators, and assigns; and as to the furniture and effects thereinbefore assigned and not included in the aforesaid trusts, upon trust, after the decease of Rebecca Hodges, to deliver the same unto the said Martha Flight, her executors, administrators, and assigns.

By her will, dated the 9th of July, 1860, Rebecca Hodges said: "I confirm the settlement I have made by deed dated the 5th day of February, 1850, of certain portions of my property;" and thereby, and by several codicils thereto, she made divers pecuniary, and a residuary bequest.

Martha Flight died before Rebecca Hodges. The properties comprised in the six mortgages were not transferred to the trustees of the settlement, and Rebecca Hodges retained in her own possession the securities for the mortgage debts, and the certificates of the Gloucestershire bank shares included in the settlement, and she died on the 25th of March, 1874, having in her lifetime received the moneys due upon some of the mortgages, and without having executed any legal transfer of the Gloucestershire bank shares, which, under the deed of settlement of the company, could only be transferred in a prescribed form. The moneys due on the remaining mortgages were received by the trustees of the settlement.

The settlement was not itself admitted to probate, which was passed of the will containing the reference aforesaid and of the codicils.

This suit having been instituted by the surviving trustee of the settlement and the will for administration of the trusts of the settlement, and if necessary, also of the trusts of the will, the Vice-Chancellor, at the hearing on the 21st of March, held that the settlement was valid and complete as to the consols transferred to the trustees, as to the mortgage
271] debts received by *the trustees, and as to the furniture and effects, but was incomplete as to the mortgage debts received by the testatrix, and as to the shares in the Gloucestershire Banking Company. The cause was then directed to stand over upon the question what was the effect, if any, of the confirmation of this settlement by the will; and it now came on for argument accordingly.

Dickinson, Q.C., and *Cozens-Hardy*, for the plaintiff, the surviving trustee of the settlement.

Robinson, Q.C., and *W. W. Cooper*, for the representatives of Martha Flight: The settlor, by her will, confirmed the settlement, and the residuary legatee cannot take under

the will except upon the terms of confirming the settlement, and making good all the gifts under it. Lord Eldon, in *Rancliffe* v. *Parkyns* (1), said: "If then there is an ambiguity, we must, notwithstanding, confirm the settlement in all respects as the testator himself has done." There is, in fact, a clear case of election as against the residuary legatee: *Brown* v. *Brown* (2); *Cooper* v. *Cooper* (3); *Cookes* v. *Hellier* (4); *Birmingham* v. *Kirwan* (5); *Codrington* v. *Codrington* (6).

W. W. Karslake, for parties in the same interest: It was clearly the intention of the testatrix to give further validity to the settlement. She confirmed the settlement, knowing the effect of her so doing. It must be treated as incorporated in the will, and it ought to be carried out in its integrity; and although the testatrix in her lifetime received some of the mortgage moneys, effect might be given to her clear intention by treating the case as one in which the confirmation amounted to a bequest of demonstrative legacies entitling the legatees to have sums equal to the funds as to which the settlement is incomplete set apart out of the estate of the testatrix.

W. Pearson, Q.C., and *Selfe*, for the residuary legatee: The settlement as regards the bank shares and moneys received *is simply a void settlement, and the only [272 question is what is the effect, if any, of the words of confirmation. There are few modern cases upon the meaning of words of confirmation in such cases, but the old authorities conclusively establish, that if the thing which is purported to be confirmed is void, the confirmation of it is void also; but if that thing is voidable only, the confirmation of it binds the person confirming. "Confirmation cannot make that good or legal which was merly void": *Arundel* v. *Pembroke* (7). "A confirmation cannot create a new thing, but gives strength to a thing which was before": *Leicester* v. *Heydon* (8).

[They also referred to Coke upon Littleton, "Of Confirmation" (9); Gilbert on Tenures, "On Confirmation" (10); Stephens' Commentaries (11).]

Again, the words of confirmation are testamentary: Jarman on Wills (12); and where a will purports to confirm an instrument which is ineffectual, the instrument itself must

(1) 6 Dow., 149, 190.
(2) Law Rep., 2 Eq., 481.
(3) Law Rep., 7 H. L., 53.
(4) 1 Ves. Sen., 234.
(5) 2 Sch. & Lef., 444.
(6) Law Rep., 7 H. L., 854.
(7) Dyer, 263 b, pl. 36.
(8) Plowd., 384, 397.
(9) Vol. ii, lib. 3, cap. 9, sect. 515.
(10) Page 75.
(11) Vol. i, p. 521, 7th ed.
(12) Vol. i, pp. 85, 86, 3d ed.

be admitted to probate, which has not been done here: *Sheldon* v. *Sheldon* (1). At all events, if the words of the settlement are to be considered as taken out of that instrument and written into this will, then effect can only be given to it as a testamentary instrument containing a specific bequest of the bank shares and moneys received, with all the incidents of such a bequest. It will therefore take effect as from the death of the testatrix; and the doctrine of ademption will apply to all the beneficiaries under the settlement, and that of lapse will apply to Martha Flight, who died before the testatrix: *Stump* v. *Gaby* (2). No question of election arises in this case, for the testatrix does not purport to dispose by her will of property which is not her own, and there are no persons who take both under the will and settlement; moreover, if there were, the residuary legatees could only be called upon, in case of election, to give effect to the settlement according to its legal operation, which as regards these properties is *nil*.

[Upon the question of election, they also referred to *Blaiklock* v. *Grindle* (3).]

273] **Gaskell*, for the charitable legatees.

HALL, V.C.: The question is whether the will of Rebecca Hodges had to any, and what, extent the effect of confirming the settlement of the 5th of February, 1850. It has been contended that as the settlement was void the confirmation of it by will was wholly inoperative. Some of the moneys on mortgage which were in terms comprised in the settlement were received by the testatrix herself in her lifetime, and the bank shares were not duly transferred by her; but although the settlement was thus incomplete, it was not incapable of being confirmed. It was complete as to part of the property it purported to comprise, and the confirmation by the will was unquestionably intended to give some further efficacy to it.

It was competent for Rebecca Hodges, by a testamentary disposition, to perfect that which was either void or voidable. This is not a case depending upon rigid rules of law; it is a mere question of the intention of the testatrix on the true construction of her will. The settlement was imperfect as to the mortgage moneys received by the testatrix before the date of her will, and the testatrix could not intend to confirm the settlement as to them, but as regards the bank shares, the will might well and should operate.

It has been said that the settlement not having been incorporated with the probate of the will, the confirmation of it

(1) 8 Jur., 877. (2) 2 D. M. & G., 623. (3) Law Rep., 7 Eq., 215.

by will cannot be regarded. I was referred to the case of *Sheldon* v. *Sheldon* (1), but I do not consider the judgment of Dr. Lushington in that case an authority to the effect that in no case in which an instrument is not set out at length in the probate of a will, this court can act upon it as having operation by means of the will.

The question often arises in the Court of Probate whether a particular document shall or shall not be incorporated in the probate of a will by being set out therein. It is often convenient that a document should be so set out. It is, however, I consider, substantially a question of practical convenience, and if a will confirms an instrument which is sufficiently identified, and probate *passes leaving in [274 the clause containing the confirmation, the instrument must, I consider, be had regard to as if it were set out in the probate.

The same and no greater effect must be given to the clause than would be given to it had this testatrix said, "I hereby declare that the bank shares specified in a certain settlement dated the 5th day of February, 1850, and made between [naming the parties], shall be held upon the following trusts," and had then set out the trusts.

As regards the bank shares, the will perfects the settlement as being a testamentary instrument, and therefore the *cestuis que trust* who predeceased the testatrix cannot take, and their shares fall into the residue of the testatrix's estate.

It has been said that the true way to give effect to the intention of the testatrix would be by turning this into a case of demonstrative legacy, but there is nothing in the will which warrants this.

The only way to give a further operation to the will would be to read it thus: "I direct that these shares shall be held upon such trusts as they would have been subject to if they had been effectually settled by the settlement, and for that purpose the will shall be treated as if it had been antedated." There is, however, no authority in support of such a reading of the will, and I think it cannot be properly adopted..

This is not a question of election. Election arises when a testator disposes of his own property and at the same time affects to dispose of property which belongs to some one else. This is a mere question of construction, and the effect is that the confirmation of the settlement by the will operates

(1) 8 Jur., 877.

as a specific bequest of the bank shares mentioned in the settlement upon the trusts thereby declared.

The costs of all parties must be borne by the settlement fund and residuary estate in equal moieties.

Solicitors: *Waterhouse & Winterbotham*, agents for L. W. Winterbotham, Stroud; *Peckett & Mytton*, agents for J. L. Fisher, Stroud; *T. W. Watkins*.

[3 Chancery Division, 285.]

V.C.H., May 22, 1876.

285] *HUNT-FOULSTON v. FURBER.

[1876 F. 68.]

Gift to Trustees—Direction to purchase an Annuity in the name of and for Annuitant—Provision against selling Annuity—Residuary Estate—Contract for sale of Annuity.

Testatrix gave a sum of £20,000 stock to be laid out by the trustees of her will in the purchase of a government annuity in the name of and for the benefit of her godson for the term of his natural life; and directed that the annuitant should not be entitled to have the value of his annuity in lieu thereof, and that if he should sell his annuity the same should cease and form part of her residuary estate. The trustees purchased an annuity in the name, and payable during the life, of the annuitant, and he entered into a contract to sell the same:

Held, that the annuitant was absolutely entitled to the annuity, and that he could make a good title to it to the purchaser.

SPECIAL CASE under the 13 & 14 Vict. c. 35, and the Judicature Acts, 1873 and 1875.

Eliza Foulston, who died on the 21st of February, 1875, by her will dated the 13th of May, 1874, after appointing four trustees, and after reciting the titles of certain funds
286] over which she had a *power of appointment and other funds belonging to her, made (among similar gifts to other persons) the following bequest in favor of the plaintiff: "I give and bequeath the sum of £20,000 stock to be laid out by my trustees in the purchase from the said Commissioners, in the name and for the benefit of my godson John Foulston Hunt" therein described, "of an annuity for the term of his natural life." The term "the said Commissioners" referred to the Commissioners for the Reduction of the National Debt. The testatrix by her will provided that the several bequests, appointments and gifts in the will contained in favor of the plaintiff should be conditional on his assuming the name and arms of Foulston in addition to those of Hunt, and that condition the plaintiff had complied with.

The will also contained the following provision: "And I direct that neither of the said intended annuitants shall

be entitled to have the value of his or her annuity in lieu thereof, and that if either of them the said John Foulston Hunt" and the other four persons named "shall sell, mortgage, pledge, or anticipate his or her annuity, the same shall thereupon cease and determine and form part of my residuary estate." There was a residuary bequest in favor of another legatee. The trustees purchased an annuity of £933 in the name, and payable during the life, of the plaintiff, who, being desirous of selling the same, entered into a contract for the sale thereof to the defendant, but he objected to complete the purchase on the ground that any such sale by the plaintiff would cause an immediate forfeiture of the annuity; the plaintiff, however, maintained that the provision in the will against selling was void, as being repugnant to the absolute bequest in his favor.

The question was whether, in the event of the plaintiff mortgaging or selling his annuity, the same would thereupon cease and determine, and form part of the residuary estate of the testatrix.

Dickinson, Q.C., and *Chubb*, for the plaintiff: The testatrix made an absolute gift, and the restriction which she endeavored to impose on the annuitant is void. There is no interposition of trustees, but the annuity is in the annuitant's own name, and the general rule, to be found in the case of *Bradley* v. *Peixoto* (1), *is, that if an [287 estate or fund be given so that the legal estate or absolute interest be vested in the donee, without any intervention of trustees, the condition that the estate or fund shall not be disposed of will not be enforced, it being repugnant to the gift. In *Shee* v. *Hale* (2), as well as in *Power* v. *Hayne* (3) and *Day* v. *Day* (4), the legal interest was not, as here, in the annuitant, and therefore the decisions in those cases are not inconsistent with that in *Bradley* v. *Peixoto* (1); but the decisions in *Power* v. *Hayne* and *Day* v. *Day* are irreconcilable, as Vice-Chancellor Malins in deciding the former case declined to follow the decision of Vice-Chancellor Kindersley in the latter. The conclusion to be arrived at is that the plaintiff can make a good contract to sell the annuity.

Hastings, Q.C., and *G. W. Chapman*, for the defendant, submitted that the contract had not been properly entered into, and could not, therefore, be carried out. Though there was no authority precisely in point, yet the decisions in *Power* v. *Hayne* and in *Hatton* v. *May* (5), before the

(1) 3 Ves., 324. (2) 13 Ves., 404. (3) Law Rep., 8 Eq., 262.
(4) 1 Drew., 569. (5) *Ante*, p. 148.

same learned Vice-Chancellor, clearly showed that the annuitant could not sell his annuity.

HALL, V.C.: I am of opinion that the decisions referred to have very little bearing upon this case. Where a testator makes an absolute gift by will to an individual he cannot take it away in a subsequent part of the will, unless he uses clear and distinct language to that effect. No doubt there was an intention to prevent the annuitant from selling the annuity, and also an attempt to make the fund form part of the residuary estate, but there being a previous absolute gift, the latter intention is inconsistent with the gift itself. The testatrix directed the trustees to purchase the annuity in the name of the annuitant, and that they have done; and the attempt to fasten a trust upon him fails. The trust created by the testatrix was at an end as soon as the trustees discharged the duty of purchasing the annuity
288] in the name of the annuitant. *The declaration will be that the plaintiff is absolutely entitled to the annuity; that it is not subject to any gift over; and that he can make a good title to it to the defendant.

Solicitors: *Deane, Chubb & Co.*

See 13 Eng. R., 726; 17 Eng. R., 616 note.

[3 Chancery Division, 295.]

V.C.H., June 2, 1876.

295] *PITT v. LORD DACRE.

[1866 P. 115.]

Statute of Limitations (3 & 4 *Will.* 4, c. 27)—*Foreign Real Estate—Annuity charged on Estate in Jamaica—Last Payment in* 1842—*Rents and Profits received since* 1870—*Arrears.*

By will in 1810, B. devised to trustees his estate in Jamaica to hold to the use that H. should, out of the rents and profits, receive for life an annuity payable quarterly for her separate use, with powers of distress and entry and perception of the rents and profits, and after her decease to the use that the trustees should pay the annuity unto her children, as she should appoint, for their lives.

The testator gave other annuities out of the rents and profits of the same estate, and gave the estate to the use of his son for life, with remainders over. The last payment on account of H.'s annuity was in 1842. H. died in 1853. She made an appointment, and arrears were due to her and her appointees. The estate was for some years a waste, and no rents and profits were received till 1870, and when received they were paid into court:

Held, that the Statute of Limitations (3 & 4 Will. 4, c. 27) did not apply to Jamaica, and that the legal personal representative of H. was entitled to be paid the arrears due to her.

PETITION. Further consideration. Peter Beckford, who died soon after the date of his will, made in October, 1810, devised to three trustees his estate situate in the island of

Jamaica, together with the negroes and slaves thereon, to hold the same to the use that his daughter Harriet should, out of the rents and profits of the said estate, receive for life an annuity of £200 English currency, payable quarterly, for her separate use, with power of distress and entry and perception of the rents and profits, and after her decease to the use that the trustees should pay the said annuity unto all the children of his said daughter, in such shares and manner as she should appoint, for their lives. The testator gave other annuities, and made them payable out of the rents and profits of the same estate; and subject to the payment of the annuities, the testator gave the estate to the use of his son for life, with remainders over.

The son became the third Baron Rivers, and died in 1831. His son, the fourth Baron Rivers, in 1833, barred the estate tail, and *died in 1866, having by will in 1862 devised [296 all his real estate to Lord Dacre upon trust for sale and disposition of the proceeds as in the will mentioned.

Suits were instituted for the administration of the fourth Baron Rivers' real and personal estates. The annuity of £200 was paid to the daughter Harriet for many years after her father's death, and the last payment on account thereof was made on the 27th of December, 1842. The daughter Harriet, who died on the 20th of December, 1853, by will in April, 1840, appointed £199 19*s.* a year of the annuity to her three daughters for life, and to the survivors and survivor, and after the death of the survivor to her son Henry for life, and after his death to her son Horace for life, and she appointed the residue of the annuity to all her children as joint tenants for life. At the death of the daughter Harriet there was due to her for arrears of the annuity the sum of £2,150 being the amount which had accrued due between the 25th of December, 1842, and the 29th of September, 1853, and there was due to her daughters (all of whom had died) and others under her and their wills for arrears of the annuity the aggregate sum of £2,100. It was stated that for several years prior to 1866 the estate in Jamaica became a waste, that no income was received from it, and that after certain proceedings had been taken in reference to its better management, Lord Dacre received since 1870 rents and profits now amounting to about £500, and paid the same into court. The Chief Clerk had certified that the legal personal representative of the daughter Harriet was entitled to the funds in court.

Eddis, Q.C., and *Bagot*, for the legal personal representative of the daughter Harriet: The devisees under the tes-

tator's will in this matter were really trustees of the annuity bequeathed on the death of his daughter Harriet for her children, according to her appointment under the power in the will. They were therefore trustees of the annuity *ab initio:* and there was an express trust of it, ousting the Statute of Limitations altogether.

[HALL, V.C.: I do not see how there can be an express trust.]

If not, then there are two points—First: The devisees 297] have the *legal estate in the property for the purpose of dividing it among the children: *Hoghton* v. *Hoghton* (1); *Brown* v. *Whateley* (2); *Jacquet* v. *Jacquet* (3).

[HALL, V.C., after referring to *Watson* v. *Pearson* (4), said he thought that the trustees had a legal estate in the property, and that the owners of the rent charges had also a legal estate in them, having powers of distress and entry for their recovery.]

Secondly; The Statute of Limitations does not apply to Jamaica.

[HALL, V.C.: That is a question of fact.]

The old English law applies to Jamaica. With respect to that, the case stands thus: The English statute 3 & 4 Will. 4, c. 27, has not been re-enacted, and is not in force in Jamaica; and therefore the law of England, as it stood before that statute, is the law of the island.

The law which regulates the prescription of actions is, as a general rule, the *lex loci fori: Ruckmaboye* v. *Mottichund* (5); Burge's Conflict of Laws (6). But whether a charge on real estate is barred by prescription depends on the *lex loci rei sitæ:* Burge's Conflict of Laws (7); Story's Conflict of Laws (8). Now, the only English statutes on the subject which were in force in Jamaica before the 3 & 4 Will. 4, c. 27, were the 32 Hen. 8, c. 2, s. 4, and the 21 Jac. 1, c. 16, which did not apply to distress or claims for rent charges, whether created by deed or will, and it is proved that there is no bar by the law of Jamaica: Shelford on Real Property Statutes (9); *Collins* v. *Goodall* (10); *De Beauvoir* v. *Owen* (11). Colonial lands are not bound by English statutes unless expressly named in them, or unless the Colonial Legislature re-enacts the statutes: Burge's Con-

(1) 15 Beav., 278, 299.
(2) 8 Hare, 145.
(3) 27 Beav., 332.
(4) 2 Ex., 581.
(5) 8 Moo. P. C., 4.
(6) Vol. i, p. 24.
(7) Vol. iii, pp. 125, 126.
(8) 6th ed., p. 582.
(9) 8th ed., p. 139.
(10) 2 Vern., 239.
(11) 19 L. J. (Ex.), 177, 182.

flict of Laws (1). The circumstances of this case exclude any presumption of payment; and as to laches, there could have been none, the estate producing *nothing till [298 very recently: *Stackhouse* v. *Barnston* (2). The right of the annuitants to all the arrears of their annuities remains untouched by any statute. The *lex loci* applies to the case, and the legal personal representative is now entitled to this money, as representing the daughter Harriet's annuity, as far as it will go. [They also cited *Forbes* v. *Adams* (3) and *Harris* v. *Quine* (4).]

J. J. Hamilton Humphreys, for a creditor of Lord Rivers' estate for a very large amount: This money is assets of Lord Rivers' estate, which has come to the hands of his executor, and the demand of the legal representative of the daughter is a stale one. As assets of Lord Rivers' estate, the money is subject to the *lex fori*, as personal estate; and the legal personal representative of the daughter has not shown, and cannot show, as against the creditor's right to Lord Rivers' real and personal estate, that this money is not, being administered in due course by this court, the property of the creditor: *Campbell* v. *Graham* (5). Moreover, I submit that six years' arrears of interest only should be allowed, if any allowance is made: *Francis* v. *Grover* (6).

Dickinson, Q.C., and *H. R. Young*, for Lord Dacre, took no part in the argument. They suggested, however, that this money was not personalty, but realty, of Lord Rivers', and asked for the direction of the court as to future payments on account of the annuity.

HALL, V.C.: The question is whether these annuities, which were given out of an estate situate in Jamaica, are, under the circumstances, recoverable after a period when, in consequence of the Statute of Limitations (3 & 4 Will. 4, c. 27), they would not be recoverable out of an estate situate in England, and I am of opinion that they are. There is no corresponding statute of limitations applicable to the island of Jamaica. These annuitants are, in my judgment, *as much entitled to recover their annuities as the [299 estate itself, as they are only portions of the estate. There is no ground for contending that the rights of the annuitants have been barred by laches on their part. In *Campbell* v. *Graham* (5) the circumstances were different. Here there was no fund out of which to pay the annuities, and therefore the annuitants cannot be considered as guilty of laches

(1) Vol. ii, p. 386.
(2) 10 Ves., 453.
(3) 9 Sim., 462.
(4) Law Rep., 4 Q. B., 653.
(5) 1 Russ. & My., 453; 2 Cl. & F., 429.
(6) 5 Hare, 39.

in not taking proceedings to obtain payment out of a non-existing thing. When there were rents and profits which became available and properly applicable for the payment of the annuities, the devisee in trust, Lord Dacre, having knowledge of these annuities, paid the moneys which he received on account of rents and profits into court, to be dealt with according to the rights of the parties. If a receiver had been appointed, he would have been directed to keep down the annuities, and I cannot consider that what has been done has taken away the rights of those who are entitled to them; therefore I shall declare that the arrears of the annuities are properly payable out of the rents and profits which have been received by Lord Dacre, and paid into court, so far as the same will extend for such payment; and I order that, subject to the payment, as between solicitor and client, of the costs of this petition, the funds in court be applied, so far as they will extend, towards payment of such arrears. Any future rents and profits must be paid into court to the same account, with liberty to apply.

Solicitors: *Meynell & Pemberton; Young, Jackson & Beard; Coulthurst & Van Sommer.*

[3 Chancery Division, 300.]

V.C.H., June 19, 1876.

300] **In re* EMERY'S ESTATE.

JONES v. EMERY.

[1876 E. 44.]

Will—Gift to three Children of Niece—A fourth Child en ventre sa mère at Date of Will.

Testatrix, who died in November, 1874, by her will in January, 1874, bequeathed to each of the three children of her niece £1,000; and if any of the said three children should die before attaining the age of twenty-one years, the legacy was to be divided between the survivors of the said three children. There was a codicil in June, 1874, confirming, as regarded this bequest, the will. At the date of the will the niece had three children living, the youngest being three years old, and a fourth child *en ventre sa mère* at the time, and born in July, 1874, claimed a legacy of £1,000:

***Held*, that the three children born at the date of the will only were entitled to legacies.**

ALICE EMERY, who died on the 17th of November, 1874, by her will, dated the 15th of January, 1874, after giving certain legacies, devised and bequeathed the residue of her real and personal estate to three trustees in trust to convert the same into money, and to pay, *inter alia*, "to each of

the three children of my niece Lucy Alice, the wife of Humphrey Bradley Jones, schoolmaster, one thousand pounds; and if any of the said three children shall die before attaining the age of twenty-one years, the legacy or legacies of the child or children so dying shall be divided between or paid to the survivors or survivor of the said three children." There was a gift of another legacy, and of the residuary estate. By a codicil dated the 26th of June, 1874, there was an alteration as to the trustees, and there were other bequests, and then a confirmation of the will in all other respects. At the date of the will Lucy Alice Jones had three children born, viz., F. L. Jones, aged seven years; J. G. Jones, aged five years; A. B. Jones, aged three years; and a fourth child, the plaintiff, then *en ventre sa mère*, and afterwards born on the 28th of July, 1874. Lucy Alice Jones and another niece were the testatrix's next of kin. The plaintiff submitted that, notwithstanding the reference in the will to the children of Lucy Alice Jones as being three in number, he was entitled to a *legacy of £1,000 un- [301
der the bequest, and prayed for declaration accordingly, but subject to such gifts over as therein contained in the event of his dying under the age of twenty-one, and for consequential relief.

The action came on to be heard on demurrer.

W. Pearson, Q.C., and *Cadman Jones*, for the demurrer, after stating the facts, were stopped by the court.

Dickinson, Q.C., and *Bardswell*, for the plaintiff, submitted that if the plaintiff had been born at the date of the will there would have been no question, and that when there was a gift to a class a child *en ventre sa mère* was considered as actually born, and was included in the class. The mention of the number three did not affect the right of the child *en ventre sa mère*, unless it could be held that it would be conclusive against the right of a child actually born. There was no allegation in the statement of claim that the testatrix knew there were no more than three children. In such a case the courts considered that the number must be rejected, and that all the children of the class should take.

They referred to the cases of *Blasson* v. *Blasson* (1); *Pearce* v. *Carrington* (2); *Spencer* v. *Ward* (3); *Daniell* v. *Daniell* (4); *Goodfellow* v. *Goodfellow* (5).

HALL, V.C.: I am of opinion that none of the authorities referred to govern this case. The will and codicil in this

(1) 2 D. J. & S., 665, 670, 688.
(2) Law Rep., 8 Ch., 969.
(3) Law Rep., 9 Eq., 507.
(4) 3 De G. & Sm., 337.
(5) 18 Beav., 356.

case were both made before the birth of the plaintiff. The gift is "to each of the three children of my niece," and if anybody had been asked at the date of the will how many children the niece had, the answer would have been three. If the gift had been to all her children, the child *en ventre sa mère* would have been included, and all four would have taken. The niece had three children actually in existence at the date of the will, and they must be taken to be the three whom the testatrix intended should have £1,000 each.
302] *There is, I consider, no ambiguity in this case. It may be observed that the testatrix uses the word "three" three times in the gift.

The demurrer must be allowed, and there must be a declaration that the three children born at the date of the will only are entitled.

W. Pearson, Q.C., referred to the case of *Sherer* v. *Bishop* (1).

Solicitors: *Redhead & Emmett*, agents for J. Moody, Derby; *Bloxams & Ellison*, agents for J. Roberts, Bangor.

(1) 4 Bro. C. C., 55.

[3 Chancery Division, 302.]

V.C.H., July 8, 1876.

RAWLINSON V. RAWLINSON.

[1875 R. 94.]

Will—Bequest of Furniture, &c., in Testator's Capital Messuage—Heirlooms—Furniture, &c., stored in another House included in the Bequest.

Testator bequeathed all his household furniture which should be in his capital messuage at his death, unto trustees upon trust to permit the same to be held and enjoyed as heirlooms with his said messuage by the person entitled to the same messuage under the will. The testator, who died in 1875, was, in 1874, the occupier of a house at Bath, which he had furnished. He ceased to occupy that house in 1874, and removed the furniture with the intention of its being placed in his capital messuage, which was in the occupation of a tenant. The tenant having declined to permit the furniture to be placed therein, it was, in consequence of such refusal, stored in farm buildings belonging to the testator, where it was at his death:

Held, that the furniture passed under the bequest.

FURTHER CONSIDERATION. W. S. Rawlinson, late of Duddon Hall, Cumberland, who died in 1875, by his will, dated the 17th of October, 1872, after appointing executors and trustees and making some bequests, bequeathed as follows: "All my household furniture, plate, glass, china, books, pictures, and articles of vertu, which shall be in my capital messuage called Duddon Hall at my death, unto my trustees, upon trust to permit the same to be held and en-

joyed as heirlooms with my said capital messuage, as far as the rules of law and equity will permit, by the person for the time being entitled *to the same messuage by vir- [303
tue of this my will, yet so that the same shall not vest absolutely in any person hereby made tenant in tail male or tail general by purchase of my said capital messuage, and who shall not attain the age of twenty-one years, but upon the death of such person under that age shall go and devolve to the person or persons who shall thereupon become entitled to the said capital messuage under the limitations of this my will."

The usual administration decree was made on the 30th of July, 1875, when an inquiry was directed as to what household furniture, plate, glass, china, books, pictures, and articles of vertu, were in the testator's capital messuage called Duddon Hall at the time of his death, and were included in the gift of chattels bequeathed as heirlooms by the said will.

The Chief Clerk, by his certificate, dated the 6th of May, 1876, certified that there were certain articles of furniture, china, and pictures (the particulars of which were set forth in a schedule) belonging to the testator, which were not actually in Duddon Hall at the time of the testator's death, such articles having been removed in the year 1874 from a house at Bath occupied by the testator with the intention of removal to Duddon Hall, but were stored away in certain farm buildings at Rawfold belonging to the testator.

The evidence showed that the testator took an unfurnished house at Bath; that Duddon Hall was let on lease as a furnished house, and that when the lease of the house at Bath expired in 1874, the testator was removing the articles of furniture, &c., to Duddon Hall, but the tenant declined to permit them to be placed in the house during his tenancy, and they were accordingly placed in store in the farm buildings.

Dickinson, Q.C., and *Almaric Rumsey*, for the widow.

Bristowe, Q.C., and *T. Latham*, and *Hastings*, Q.C., and *Morshead*, for the other parties.

The cases of *Lord Brooke* v. *Earl of Warwick* (1) and *Land* v. *Devaynes* (2), and Jarman on Wills (3), were cited.

*HALL, V.C.: I am of opinion that all these articles [304
of furniture, and other things mentioned in the schedule, passed under the bequest in the will.

Solicitors: *Tyler, Wickham & Moberly; Johnston & Harrison*, agents for Harrison & Son, Kendal.

(1) 2 De G. & Sm., 425–436. (2) 4 Bro. C. C., 537. (3) Vol. i, p. 722, n.

[3 Chancery Division, 304.]

V.C.H., July 14, 1876.

GARDNER v. COWLES.

[1869 G. 31.]

Bequest to an Infant—Trusts for Maintenance, Education and Accumulation—Investment in Consols in names of Executors and Infant—Death of Executors—Trustee Act, 1850, *and Trustee Extension Act*, 1852—*Infant "Trustee" of the Consols.*

Testator bequeathed a legacy to each child, and directed his executors to stand possessed of his residuary estate in trust for all his children, the shares of those under age to be invested in consols, and paid to them at twenty-one or marriage. There were trusts for maintenance, education, and accumulation for the benefit of the infants. The executors invested the legacies and shares of two of the infants in consols in their own and the infants' names, and died leaving the infants surviving:

Held, that the definition of "trustee" in the Trustee Act, 1850, sect. 2, included the case of consols which had been transferred into the name of an infant who was the sole beneficial owner of them, but subject to a direction in regard to maintenance or otherwise, vested in somebody else, and which direction could not in this case be practically performed so long as the consols remained in the name of the infant; and *ordered* that the infants be treated as trustees of the consols; and the legal personal representative of the last surviving trustee under the will was appointed to transfer the consols into court.

PETITION. The testator, after bequeathing a legacy of £1,000 to each of his children, directed his executors to stand possessed of his residuary estate in trust for all his children, the shares of such of them as should be under the age of twenty-one years at the time of his decease to be invested in the names of his executors in consols, and paid to such children, if sons, at the age of twenty-one years, and if daughters, at that age or marriage. The will contained 305] *trusts for maintenance, education, and accumulation for the benefit of the infant children. The executors converted the residuary estate, paid the legacies and shares of the children who had attained the age of twenty-one years, and invested the legacies and shares to which the two infant daughters were entitled in consols in the joint names of themselves and of the said infant daughters respectively. Both of the executors had died, leaving the two infant daughters surviving them. The defendant was the administratrix of the last surviving executor. On the hearing of the cause certain inquiries were directed to be made.

On the 7th of December, 1875, it was, *inter alia*, ordered that the plaintiffs should take such steps as might be necessary to bring the fund representing the two infants' legacies and shares into court, and thereupon the plaintiffs presented a petition under the Trustee Acts praying that each of the infants might be declared to be a trustee, within the

meaning of those acts, of the fund standing in her name and representing her legacy and share; that the right to transfer such funds might be vested in the defendant; and that she might be directed to transfer the funds into court in accordance with the order of the 7th of December, 1875; and on the 11th of February, 1876, Vice-Chancellor Hall made the order asked for.

July 14. The petition was now put in the paper to be mentioned, as the Bank of England had raised a question as to the regularity of the order of the 11th of February, 1876, which had not yet been passed and entered.

W. Pearson, Q.C., and *E. Ward*, for the petitioners, referred to the case of *Sanders* v. *Homer* (1), where a trustee transferred trust stock into the joint names of himself and his infant *cestui que trust*, and died, and it was held that the infant was a trustee within the Trustee Act, 1850, and within the 3d section of the Trustee Extension Act, 1852, and an order was made vesting the right to transfer in the executors of the deceased trustee with the view of having it brought into court. This case was much stronger, as the infant in *Sanders* v. *Homer* was absolutely entitled, and in this case there were trusts for maintenance, education, *and accu- [306 mulation. Though it might be said that those trusts applied only to the shares of the residue and not to the legacies, yet the answer would be that those shares and legacies were invested together and formed a common fund, and must be brought into court to be dealt with in the administration of the testator's estate, as certain allowances for maintenance and education had been made out of that estate. In *Re Westwood* (2) the infant was absolutely entitled, and as there was no trust it was not a case for bringing the fund into court. The Bank of England had raised an objection to the order, but the bank was indemnified by the 7th section of the Trustee Extension Act, 1852, which enacted, "that every order made . . . . under this or the Trustee Act, 1850, ... and duly passed and entered, shall be a complete indemnity to the Bank of England . . . . for any act done pursuant thereto; and it shall not be necessary for the Bank of England . . . . to inquire concerning the propriety of such order. . . . ." The order made in February was perfectly regular, it being clear the consols had got into wrong names; and that they ought to be transferred into court.

Kekewich, for the Bank of England, submitted that the case of *Re Westwood*, where a similar order was discharged,

(1) 25 Beav., 467. (2) 6 N. R., 61, 316.

ought to be followed, as the order in this case was irregular. The order directed that the consols should be transferred into court to two separate accounts, and not to the credit of the cause, and therefore the contention that they ought to be brought into court for administration purposes was erroneous. The bequests of the legacies were absolute, and the subsequent trusts in regard to maintenance, education, and accumulation, could not apply to them. In clause 2 of the Trustee Act, 1850, it was enacted that the words "'trust' and 'trustee' shall extend to and include implied and constructive trusts, and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust;" but a person having the whole beneficial interest could not be a trustee for himself, and sect. 3 of the Trustee Extension Act, 1852, where power was given to the court to make an order for the transfer or receipt of dividends of stock standing in the name of 307] *an infant trustee solely or jointly, did not apply to this case. Though the Bank of England might be indemnified by sect. 7 of the Trustee Extension Act, 1852, yet it had always been the custom to mention cases of doubt, and where a principle was involved, to the court. The statutory indemnity referred to simple cases. The proper course, it was submitted, would be to make an order under the statute 11 Geo. 4 and 1 Will. 4, c. 65, s. 32, and as in the case of *Re Pongerard* (').

W. H. Weldon, for the respondent.

HALL, V.C.: The definition of the word "trust" in sect. 2 of the Trustee Act, 1850, is, that it "shall not mean the duties incident to an estate conveyed by way of mortgage; but with this exception the words 'trust' and 'trustee' shall extend to and include implied and constructive trusts, and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of personal representative of a deceased person;" and it appears to me that it is not an unreasonable or an unsound construction to hold that this definition of a "trustee" is sufficient to include the case of consols which have been transferred into the name of an infant who is the sole beneficial owner of them, but subject to some provision or direction in regard to maintenance or otherwise, which is vested in somebody else, and which provision or direction cannot, in the events that have happened, be practically operative or performed so long as the consols remain in the name of the

(') 1 De G. & Sm., 426.

infant. By the word "practically" I mean practically performed according to the intention of the creator of the disposition, though there may be some statutory provisions which may be resorted to for the purpose of accomplishing the same object in another form and mode. Where a fund has been so transferred, it is not unreasonable to hold that this definition extends to such a case, so as to allow the fund, through the machinery of the acts of Parliament, to be brought back again into the name, and placed in the position it ought to be in, and *would have [308 been in, but for the irreglarity or impropriety of putting it into the name of the infant. It appears to me that the clause in regard to maintenance and education has reference to all the provisions made for each particular infant; and consequently includes both legacies and shares of residue. I am of opinion, therefore, that neither the legacies nor the shares of residue ought to have been put into the names of the infants at all. They ought to have been invested so that, in all the events which might happen, the income of the funds might be received by persons who could receive it, which infants could not, in order that it might be applied in execution of the direction and trusts for maintenance and education contained in the will. It appeared to me that the proper course was to make an order by which the infants should be treated as trustees of the funds so transferred into their names, for the purpose of having the funds placed in the names in which they ought to be, i.e., the names of the legal personal representatives of the last surviving trustee and executor. The order of the court directed that the funds should be brought into court and placed to certain accounts, and it still appears to me to be competent to the court, acting within the scope and under the provisions of the act of Parliament, to order that the funds be transferred into court. Therefore, having declared that the infants are trustees within the meaning of the provision in the act of Parliament, for the purpose of having a transfer of the funds into the names of the legal personal representatives of the last surving trustee; and being of opinion that, instead of having the funds so transferred, they should be transferred into court, I appoint the legal personal representative of the last surviving trustee and executor to make such transfer, and direct that the order made in February be dated as of to-day.

Solicitors: *T. Angell; Freshfields & Williams; F. W. Imbert-Terry.*

[3 Chancery Division, 309.]

V.C.H., March 13, 1876.

339] # *Fairer v. Park.

[1872 F. 22.]

Will—Construction—Bequest of "all my Personal Property"—Specific Bequest—Trust Estate—Bequests by Trustee to Tenants for Life absolutely—Satisfaction.

A gift by will by a testator to his wife of "all my personal property, all sums of money which I may possess or may be owing to me at the time of my decease, together with all the furniture, farming implements," and other things in the family mansion, is not specific.

A testator who had two sums of £1,000 and £500 in his hands upon trust for his sisters E. and A. respectively for life, for their separate use, and after their deaths for their children equally, by his will desired that his real estate should be sold, and that two sums of £1,000 and £500 should be paid to his sisters out of the proceeds of sale, and desired that the remainder of the proceeds of sale might be equally divided amongst other persons named:

Held, that the gifts to the sisters were not a satisfaction of the moneys held by testator as trustee for his sisters and their children.

George Park, of Asby Hall, who died in December, 1871, by will in January, 1870, gave to his wife, Agnes Park, Jons House and all lands belonging to the same, and then proceeded thus: "I also give and bequeath to my wife all my personal property, all sums of money which I may possess or may be owing to me at the time of my decease, together with all the furniture, farming implements, stock, and crop belonging to the Asby Hall estate; secondly, I desire that the whole, known as 'Asby Hall,' and the lands belonging to that estate, may be sold after my decease, and that the sum of £1,000 sterling be paid to my sister Elizabeth Guy, of Asby, and the sum of £500 sterling to be paid to my sister Agnes Waller, of Hartley, out of the proceeds of the sale of the aforesaid estate; thirdly, I desire that the remainder of the proceeds of the sale of the aforesaid estate may be equally divided between my nephews and nieces, and the daughter and sons of Sarah Fairer, of Asby," the four named; "these all to have in equal shares and proportions the remaining proceeds of Asby Hall estate after the payment of the aforenamed sums of money to my two sisters." By a codicil made in October, 1871, the testator appointed two executors (the plaintiffs), and desired
310] *that all his just debts, funeral and testamentary expenses, should be paid and satisfied by them.

George Park was the sole surviving trustee of the will of his father, James Park, who bequeathed to his wife Esther and to his son George £1,500, upon trust as to £1,000, part

thereof, to pay the interest at £4 per cent. unto his daughter Elizabeth Guy for life, for her sole use and benefit, without being subject to the debts or control of her then or any future husband, and after her decease upon trust for her children at the age of twenty-one or daughters at marriage, with benefit of survivorship, share and share alike, and as to £500, part thereof, upon the like trusts in favor of his daughter Agnes Waller for her life, and for her children after her decease. Esther Park died in 1847. After her death George Park duly paid the interest of the two sums of £1,000 and £500 to his said sisters, but the plaintiffs believed that no sums were ever appropriated by him out of the estate of James Park to provide for those legacies. This suit was commenced for the administration of George Park's estate. A question arose whether the sums bequeathed by George Park to his sisters Elizabeth and Agnes were intended to be in satisfaction of the sums of £1,000 and £500 bequeathed to them by the will of their father.

As to the £500 (part of the £1,500) the Chief Clerk certified that it was a debt due from the testator's estate together with interest at £4 per cent. from the 4th of August, 1871. He also certified that Esther Park assented to the legacies of £1,500 under the will of James Park, and in January, 1832, handed over to George Park certain securities and moneys amounting in value to £1,500, which he converted into cash and retained and applied the same to his own use; and the Chief Clerk submitted to the court whether the desire in George's will amounted to a bequest of legacies of £1,000 and £500 to his sisters, or whether it was more than a direction to pay the debt referred to, in the proportions in which his sisters were interested.

It was stated in the answer of Mrs. Waller that on the 29th of February, 1868, George Park gave a memorandum that he had that day paid to Agnes Waller, his sister, the sum of £10 due the 2d of February, 1868, being half-year's interest on the sum of *£500 which he had in his [311 hands belonging to the said Agnes Waller, or owing by him to her.

Ince, Q.C., and *Everitt*, for the plaintiff's executors, stated the facts.

Eddis, Q.C., and *Heysham*, for the defendant Agnes Park, submitted that as George Park knew that he was liable to pay the sums of £1,000 and £500 to his sisters, the sums which he gave by his will to them were in satisfaction of the debts so far as they were concerned; but they might not be considered to be in satisfaction of the claims of their

children. In *McCarogher* v. *Whieldon* (1) a question of election (2) arose, and the doctrine laid down there would apply to the two sisters in this case. Assuming that the gifts of £1,000 and £500 were not in satisfaction of the debts of those amounts, the payments which might be ordered to be made ought not to come out of the testator's personal estate, as that had been specifically given to Agnes Park.

They referred to *Vaughan* v. *Buck* (3) and *Bethune* v. *Kennedy* (4), and *Sutherland* v. *Cooke* (5), which was distinguished from the present case.

Morgan, Q.C., and *Daniel Jones*, for a defendant in the same interest, submitted that this was simply a question of the testator's intention; that the memorandum of the 29th of February, 1868, was clearly admissible to show what that intention was; and that the testator, knowing that he was indebted as to the two sums mentioned in his will, made a provision in satisfaction of the claims, and not as bounty to his sisters. They referred to *Campbell* v. *Campbell* (6); *Alleyn* v. *Alleyn* (7); *Bartlett* v. *Gillard* (8); *Atkinson* v. *Littlewood* (9); *Edmunds* v. *Low* (10); *Cole* v. *Willard* (11); *Pinchin* v. *Simms* (12); *Wathen* v. *Smith* (13); *Charlton* v. *West* (14); *Bensusan* v. *Nehemias* (15).

312] **Townsend*, for the defendant George Park, referred to *Edmunds* v. *Low* (10).

Dickinson, Q.C., and *Speed*, for Mr. and Mrs. Guy:

[HALL, V.C.: The only question on which I wish to hear any argument is, whether there was a specific gift to Agnes Park.]

We contend that as there was by the codicil, by which executors were appointed, an express direction to pay all the debts, funeral and testamentary expenses, the sums owing by George Park as trustee must be paid out of his personalty.

Dryden, for the defendants Fairer.

Dundas Gardiner, for the children of Mr. and Mrs. Guy.

Smart, for Mrs. Waller and her children.

Eddis, in reply.

HALL, V.C.: I am of opinion that upon the true construction of this will there is not a specific gift of "all sums of

(1) Law Rep., 3 Eq., 236.
(2) Page 244.
(3) 1 Ph., 75.
(4) 1 My. & Cr., 114.
(5) 1 Coll., 498.
(6) Law Rep., 1 Eq., 383.
(7) 2 Ves. Sen., 37.
(8) 3 Russ., 149.
(9) Law Rep., 18 Eq., 595, 607.
(10) 3 K. & J., 318.
(11) 25 Beav., 568.
(12) 30 Ibid., 119.
(13) 4 Madd., 325.
(14) 30 Beav., 124.
(15) 4 De G. & Sm., 381.

money which I may possess, or may be owing to me at the time of my decease, together with all the furniture, farming implements, stock, and crop belonging to the Asby Hall estate," to the defendant Agnes Park. The dispositions are, first of all, a gift of "all my personal property," and then the words which I have read are thrown in, not for the purpose of making anything specific, but for the purpose of preventing the possibility of a question arising as to the specified things being included under the terms "all my personal property." The testator immediately afterwards disposed of the Asby Hall estate, and as he perhaps imagined that some of the things given to his wife might go with the estate, he used words which showed that he meant they should go as personal estate, and be included in his general personal property, and I cannot say that that is sufficient to enable me to hold that those and the other specified things, which are mixed up with the general gift of personalty, *were given specifically. As to the ques- [313
tion, whether the testator, who owed to his two sisters and their children moneys which came into his hands, satisfied those debts by gifts of sums to his two sisters absolutely, the gifts to them are of £1,000 and £500 out of the proceeds of sale of the testator's real estate, the surplus of those proceeds being given to other parties. That is a circumstance which is not unimportant, though I do not think that in its absence I should have arrived at a different conclusion. The £1,000 in the testator's hands for one sister was held by him upon trust to pay the income to her "for life for her sole use and benefit, without being subject to the debts or control of her then or any future husband, and after her decease, upon trust for her children at the age of twenty-one, or daughters at marriage," share and share alike; and as to the £500, he held it upon like trusts for his other sister and her children. The £1,000 mentioned in the testator's will is a simple gift of that sum, not as trustee, and not in any way referred to as being due, and owing by him as trustee, or as being in satisfaction of the gift which he held in trust. It is not given to her for her sole and separate use, and therefore her husband became entitled to it in her right without any trust attaching to it. There is a great difference in that respect, and there is also a difference in respect of the £1,000 given by the will of James Park being a life interest, and the corpus being given to the children. These are differences so material, that any presumption which might have existed in favor of the gift of £1,000 being in satisfaction of the debt so called is rebutted. There is no

authority which shows that I ought to hold that the one gift ought to be taken in lieu of the other. The case of *Campbell* v. *Campbell* (1) was decided upon the ground that there were double portions; and in *McCarogher* v. *Whieldon* (2), a father, who had covenanted to do certain things, by will or otherwise, in favor of a son and his family, by will made a disposition for the benefit of all his five children, and it was held to be a satisfaction as regarded the son, but not as regarded the son's wife and children.

The other cases referred to have reference to gifts for separate use. What I have said as to the difference in the 314] gifts in this case *would, in my judgment, be sufficient without the aid of the difference as to the separate use in the one gift and not in the other. At all events the gift to the separate use in one case is not unfavorable to the conclusion at which I have arrived. Assuming that the separate use alone would not be sufficient, still it is a circumstance which must be taken into consideration. This case seems to me to be within the principle stated by the Master of the Rolls in *Fourdrin* v. *Gowdey* (3), where he said it was "a question, not of satisfaction, but performance," and also within the cases of *Rowe* v. *Rowe* (4), in which Sir J. L. Knight Bruce referred to Lord Lyndhurst's observation in *Bartlett* v. *Gillard* (5), that the circumstance of the gift of one annuity being for separate use and another not was a material fact; and *Edmunds* v. *Low* (6), where *Rowe* v. *Rowe* was referred to by Vice-Chancellor Page Wood. In my opinion these legacies cannot be held to be a satisfaction of the liabilities of the testator under the will of James Park, and therefore there must be a declaration to that effect.

Solicitors: *Gray & Mounsey*, agents for E. Heelis, Jun., Appleby; *W. H. Tattam*, agent for T. H. Preston, Kirkby Stephen; *Nicol, Son & Jones*, agents for Bleaymire & Shepherd, Penrith, and also for G. R. Thompson, Appleby; *J. C. Rutter & Son*, agents for Cant & Fairer, Penrith.

(1) Law Rep., 1 Eq., 383.
(2) Law Rep., 3 Eq., 236.
(3) 3 My. & K., 383, 410.
(4) 2 De G. & Sm., 294, 298.
(5) 3 Rus., 149.
(6) 3 K. & J., 318.

[3 Chancery Division, 317.]

C.J.B., July 10, 1876.

*In re MESSENGER. *Ex parte* CALVERT. [317

Solicitor's Lien—Title-Deeds held for Mortgagor and Mortgagee—Bankruptcy of Mortgagor—Sale of Equity of Redemption by Trustee—Right of Solicitor to retain Costs out of Purchase-money.

A solicitor was instructed to prepare a mortgage, and the title-deeds of the property were deposited with him for this purpose by the mortgagor. He was also acting as solicitor for the mortgagee, and when the mortgage was executed he continued to hold the deeds on behalf of the mortgagee. The mortgagor filed a liquidation petition, and the solicitor was employed on behalf of the trustee. The trustee sold the equity of redemption, and the solicitor received the purchase-money:

Held (reversing the decision of the County Court judge), that the solicitor had a lien on the deeds against the mortgagor, and was entitled to retain out of the purchase-money the amount of costs due to him from the mortgagor.

THIS was an appeal from a decision of the judge of the Scarborough County Court.

Joseph Messenger, a provision dealer at Scarborough, filed a liquidation petition on the 15th of July, 1875, under which James Fisher was appointed trustee. Mr. F. W. Calvert was appointed solicitor to the trustee. Calvert had acted as solicitor for the debtor. Some time before the liquidation the debtor instructed Calvert to prepare a mortgage of some freehold property belonging to him, and deposited with him the title-deeds of the property for that purpose. Calvert also acted as solicitor for the mortgagees, and after the mortgage was completed he held the deeds on their behalf. The trustee instructed Calvert to sell the mortgaged property subject to the mortgage, and the equity of redemption was accordingly sold for £114 2*s.* 9*d.* This sum was received by Calvert from the purchaser, and he claimed to retain out of it £80 5*s.* 1*d.* for costs due to him from the debtor in respect of the preparation of the mortgage and other matters. Calvert claimed a lien upon the deeds as against the debtor for this amount, and he retained it out of the £114 2*s.* 9*d.*, handing over only the balance of £33 17*s.* 8*d.* to the trustee. The judge was of opinion that Calvert was not entitled to the lien which he claimed, and ordered him to pay the £80 5*s.* 1*d.* to the trustee. Calvert appealed.

**De Gex*, Q.C., and *J. T. Humphry*, for the appel- [318
lant: The County Court judge thought that by selling the equity of redemption for the trustee the appellant had lost his lien. His honor held that the property in the deeds had passed to the trustee, and that the solicitor had no lien upon

the money of his client. We contend that the solicitor had a general lien for his costs on the deeds: *Colmer* v. *Ede* (1); and that he is now entitled to deduct his costs from the purchase-money. If the debtor had paid off the mortgage he could not have got the deeds from his own solicitor without satisfying his lien, and the trustee is in the same position. When the equity of redemption was sold a good title could not be made to the purchaser without satisfying the lien. Subject to the mortgage the solicitor had a lien on the deeds, and at the commencement of the liquidation the deeds were in his possession. The property in the deeds passed to the trustee subject to the mortgage and to the solicitor's lien.

Bagley, and *Finlay Knight*, for the trustee: We admit that the solicitor had a general lien so long as he held the deeds for the debtor, but he ought to have discharged his lien on the creation of the mortgage. After the creation of the mortgage he held the deeds for the mortgagee. The fact that he happened also to be the mortgagor's solicitor made no difference. The trustee might have redeemed the deeds upon paying off the mortgage debt, and the mortgagee, when that was done, could have insisted upon the deeds being restored.

BACON, C.J.: The facts of this case are a little complicated, but when close attention is given to them there is no difficulty in understanding them. It is not disputed that in the first instance Mr. Calvert held the deeds for the mortgagor, and that he had a lien upon them for his costs. But it is said that when the mortgage was made he in effect parted with the deeds. As a matter of fact he did not, for he holds them still. The law is clear that a person who from his position has a right of lien, does not lose that right
319] *unless there is some special agreement that he shall do so. No such agreement is alleged in the present case. Is not then the result this, that the property was subject to the mortgage and also to the solicitor's lien? *Colmer* v. *Ede* (1) is a distinct authority, and indeed it is admitted, that the solicitor originally had a general lien on the deeds. Then I ask in what way has he parted with his lien? The trustee, in the discharge of his duty, sold the equity of redemption. The purchaser could have enforced the contract for sale, and if he had made a claim for specific performance the court would have required that every incumbrance upon the property should be cleared away for the purpose of making a good title to the purchaser. The mortgagee, when

(1) 40 L. J. (Ch.), 185.

called upon to reconvey the estate, would have been justified in saying to the mortgagor, I will take my money and convey the estate, but the deeds I cannot give you, because, not by any act of mine, they are not mine to give; but they are subject to your solicitor's lien. Your solicitor claims a lien upon them, not as against me, but as against you, and I cannot deprive him of it. Nothing has happened to deprive Mr. Calvert of the lien which he originally acquired, though the amount of it may have to be the subject of inquiry and taxation.

Solicitors for appellant: *Iliffe, Russell & Iliffe*, agents for W. B. Richardson, Scarborough.

Solicitors for trustee: *Spurr & Nethersole*, agents for Cornwall & Watts, Scarborough.

[3 Chancery Division, 327.]

V.C.M., Feb. 25: C.A., June 1, 24; July 11, 1876.

*MADDY v. HALE. [327

[1853 M. 119.]

Ecclesiastical Leases—Trust to renew out of Income—Impossibility of Renewal—Tenant for Life—Enjoyment in Specie.

A testator gave to his trustees a tithe rent charge held under an ecclesiastical lease for twenty-one years, which was in practice renewed every seven years on payment of a fine, upon trust to renew out of the proceeds, and to apply the surplus in a certain way during the life of his wife, and directed that after her death it should form part of his residuary estate. He gave his trustees power at any time to sell the leasehold interest.

The lease having ceased to be renewable:

Held, by Malins, V.C., that the persons interested during the life of the widow were entitled to receive the rent charge free from any deductions for raising a renewal fund; and that a renewal fund which had been raised out of the income, but could not be applied for renewal, must be paid to the persons entitled to the income.

Held, on appeal, that the leasehold interest ought to be sold and the proceeds invested, and only the income of this fund and of the renewal fund applied as income.

Tardiff v. *Robinson* (1) distinguished.

THE late John Maddy, D.D., who died on the 17th of June, 1853, by his will, dated the 16th of June, 1851, gave to trustees his share of the great tithes, or commutation rent charge in lieu of tithes, arising out of the parishes of the Holy Trinity and St. Mary in Ely, to which he was entitled under a lease from the Dean and Chapter of Ely, upon trust to renew the said lease from time to time out of the proceeds of the said tithes, and to divide the surplus annually during the

(1) 27 Beav., 629, n.

life of his wife equally between her and his four grandchildren, whom he named, and after the decease of his wife he directed that the tithes should become part of his residuary estate. He empowered his executors at any time after his decease, if they saw fit, to sell the said tithes or rent charge, and to invest the money arising therefrom in the Three per Cents. He gave his residuary estate equally among the above four grandchildren and two others, viz., the petitioner and one of the defendants.

The suit was instituted for the administration of Dr. 328] Maddy's *estate. At the time of his death he was equitably entitled to one equal tenth share in the Rectory of Holy Trinity and St. Mary in Ely, and the Chapel of Chettisham, and certain glebe lands and tithe rents charge, for the residue of a term of twenty-one years, commencing from the 29th of September, 1838, the entirety being vested in trustees upon trusts for obtaining the renewal of the lease from time to time, and for raising out of the rents and profits derived from the property leased or by mortgage the necessary fine for renewal, and subject thereto, in trust for certain persons in certain shares, of which Dr. Maddy was entitled to one-tenth share.

This lease was in practice renewed once every seven years, on a surrender of the previous lease and on payment of a fine.

The order on further consideration in the suit, which was dated the 20th of April, 1857, directed that, after retaining during the years 1855, 1856, 1857, 1858, and 1859, such a sum as would be sufficient to provide a fund for the renewal of the lease, the surplus income should be applied in the manner provided by the will, and that after the year 1859 the whole of the surplus of the rent charge should be divided in the same way, without any deduction for renewals, until the further order of the court, and liberty was given to apply to the court for directions as to such parts of the estate as might be outstanding.

The trustees of the lease renewed it in 1859, the accumulated fund being applied towards that object. The trustees under the will continued, without any further direction from the court, to set apart a renewal fund, with the aid of which a further renewal was effected in 1866, and since that time they had accumulated another fund, now represented by £1,003 6*s*. 7*d*. consols.

Subsequently to the year 1866 the reversion of the lease became vested in the Ecclesiastical Commissioners, and they

declined to allow any further renewals, and there was no right of renewal as against them.

The present petitioner, who was one of the plaintiffs and interested in the property which would become distributable on the death of the testator's widow, and was also one of the trustees under the will, now presented this petition, asking that the accumulated fund might be transferred into court, and that, after *payment of the costs of the [329 petition thereout, the residue might be treated as corpus, and the income applied as in the will, and that the lease might be sold and the proceeds invested and treated as corpus, and the income applied in the same way.

The petition came on for hearing before Vice-Chancellor Malins on the 25th of February, 1876.

Langworthy, for the petitioner: This is not a mere power, but a trust for renewal of the lease. If it had continued to be renewable, it would have been the duty of the trustees to set apart a fund for the purpose of renewing. It would be unreasonable that the tenant for life should derive a benefit from an event which has diminished the reversionary value of the estate. The proper course is to have the fund permanently invested, and so let the loss be apportioned between those interested for life and those in remainder. The same point has in fact been decided in *In re Wood's Estate* (1), which was followed in *Hollier* v. *Burne* (2), which in principle governs the present case.

The court is now in the place of the trustee of a trust for sale, which overrides the interests of the beneficiaries.

Collier, for another of the persons interested in reversion only: *In re Money's Trusts* (3) shows the distinction between a mere power and a trust such as there is here.

Berkeley, for parties interested both ways, did not argue the point.

Glasse, Q.C., and *F. Vaughan Hawkins* and *Dunning*, for parties interested during the life of the widow only: The questions raised on this petition have been already decided. In *Tardiff* v. *Robinson* (4), on which *Morres* v. *Hodges* (5) was founded, there was, as here, an express trust to renew, and the renewal having become impossible, the tenant for life was held to be entitled to the enjoyment of the entire income in specie. In *Hayward* v. *Pile* (6), on appeal, the court refused to sanction an *arrangement [330 as to ecclesiastical leases which had ceased to be renewable,

(1) Law Rep., 10 Eq., 572.
(2) Law Rep., 16 Eq., 163.
(3) 2 Dr. & Sm., 94.
(4) 27 Beav., 629, n.
(5) 27 Beav., 625.
(6) Law Rep., 5 Ch., 214.

on the ground that the effect would be to diminish the income of the tenant for life. But the point in question is really disposed of by the order on further consideration, which expressly directs the payment of the income to be made without deducting a fund for renewal. *In re Wood's Estate* (1) is not really contrary to *Morres* v. *Hodges* (2). It was only a case of interim investment, and it left open the power to apply for a permanent investment. The petitioner has created the difficulty by accumulating a fund contrary to the order of the court, which ought to have been paid to the persons having the life interest.

Hull and *Millar*, for other parties similarly interested.

Langworthy, in reply.

MALINS, V.C.: This petition raises a point of very considerable importance to persons holding property on ecclesiastical leases which were ordinarily renewed from time to time, and were considered to be perpetually renewable. The Legislature, however, interfered, and the result was that these leases were no longer renewable, and persons who believed they had as good an estate as a fee simple found themselves in the position of being simply leaseholders for short terms. The consequence of the previous practice as to renewal was, that those who possessed this species of property were accustomed in disposing of it by will to set apart a portion of the income for the purpose of a renewal fund. [His Lordship then stated the facts of the case, and continued:]

Addressing myself in the first instance to the case as if there had been no hearing on further consideration, the first question is, what is the position of a person having a life interest in a lease believed to be perpetually renewable, but which afterwards ceases to be so? I am of opinion that the interests of the tenants for life are not to be abridged by the taking away of the power of renewal. I am further of opinion that the persons interested during the life of the widow 331] are entitled to the enjoyment of the *property in specie, and that on her death, if that event should happen before the expiration of the lease, whatever interest may be then left will belong to those in remainder.

Then comes a question also of great importance; it is whether, inasmuch as if another renewal had taken place the fund now accumulated would have been applied in paying the fine, the persons interested during the life of the widow are bound to submit to have their interests diminished by the sum set apart for renewal. If there had been

(1) Law Rep., 10 Eq., 572. (2) 27 Beav., 625.

no decisions, my opinion would have been that the justice of the case would be met by putting the parties in the same position as if the renewals had gone on. Assuming, for instance, that, after providing a fund for renewal, there was an available balance of income of £250, that sum would be paid to the persons interested during the life of the widow, and the rest appropriated to the renewal fund. But the question is concluded by the decision of Lord Eldon, pronounced in the year 1813, in *Tardiff* v. *Robinson* (1), where there were leaseholds believed to be renewable, and held upon trusts to renew, and to apply the proceeds, after providing for the renewal fund, in a particular way, and he held that when the leases had ceased to be renewable a person interested for life only was entitled to receive the rents free from any deduction for the purpose of creating a renewal fund. That case was followed by Lord Romilly in *Morres* v. *Hodges* (2), and all the authorities are the same way except *In re Wood's Estate* (3), and therefore I should be bound by those authorities, however strong my own opinion might be. I am therefore bound to decide that there is no right to impound any part of the income, but that the whole ought to be paid over.

Against these authorities the only case cited is *In re Wood's Estate*, as to which I can only say that I do not concur with all the Vice-Chancellor appears to have said in that case. I think he took an erroneous view in saying that it was a case of one perpetuity substituted for another, and that there was a departure from the rule acted on in *In re Money's Trust* (4), that when a railway company takes possession of land in which there is a person *interested for life, or having a leasehold interest, the court will put the tenant for life as far as possible in the same position as he was before, or, in other words, give him the income of the fund when invested, with sufficient dipping into the capital to make up for the diminution in the interest arising from the change of investment. I am unable to concur in that decision, which seems to be directly opposed to *Morres* v. *Hodges* (2), though the Vice-Chancellor does not profess to overrule it, or the decisions on which it was founded, or say that he would not follow *Morres* v. *Hodges* in a similar case. [332

Now the broad point in the present case was decided in *Morres* v. *Hodges*, and the Master of the Rolls says in his judgment, "I think I am bound by the decision of Lord

(1) 27 Beav., 629, n.
(2) 27 Beav., 625.
(3) Law Rep., 10 Eq., 572.
(4) 2 Dr. & Sm., 94.

Eldon in *Tardiff* v. *Robinson* (1) that the fund belongs to the tenant for life."

In text-books the subject is treated as having been settled in this way. Above all, *Hayward* v. *Pile* (2) expressly decided that the court would not compel the purchase of a reversion at the expense of a tenant for life without his consent.

I am therefore completely bound by these decisions to say that the parties entitled to the rent charge are entitled to it without any deduction for the purpose of making a renewal fund. But what surprises me is, that this application is made in the face of the order of the Vice-Chancellor Kindersley on further consideration, directing that after 1859 the trustees shall divide the whole surplus of the rent charge without any deduction in respect of renewals. Therefore here is an express direction, and in violation of that order the trustees have set aside a fund to renew what is incapable of being renewed. I am of opinion that the petitioner has been wrong in principle from beginning to end, and the petition must be dismissed; and although I should be glad if he could be relieved from paying the costs, as that view is not acquiesced in, the dismissal must be with costs.

The petitioner appealed from this decision, and the appeal came on to be heard on the 1st of June, 1876.

333] **Hastings*, Q.C., and *Langworthy*, for the appellant: We submit that the principle of the cases is this: If there is discovered in a will a paramount trust for renewal, then, whatever accident may happen, the property cannot be so dealt with as to benefit the tenant for life at the expense of the remainderman—though the case may be otherwise where the testator contemplated the possibility of non-renewal: *In re Wood's Estate* (3); *Hollier* v. *Burne* (4); *In re Money's Trust* (5); *Hayward* v. *Pile* (2). In *Tardiff* v. *Robinson* (1) there was not a paramount intention to renew; nor in *Morres* v. *Hodges* (6). The property being now a wasting property ought to be sold, and the proceeds and the accumulation fund treated as capital. Then as to the order on further consideration, we contend, first, that it is wrong on the face of it, and the court can disregard it. Secondly, that as it directs a certain payment until further order, the court can deal with the matter now on the merits. Thirdly, that the order does not affect the glebe land, and so cannot, at all events, affect the appellant's title to relief

(1) 27 Beav., 629, n.
(2) Law Rep., 5 Ch., 214.
(3) Law Rep., 10 Eq., 572.
(4) Law Rep., 16 Eq., 163.
(5) 2 Dr. & Sm., 94.
(6) 27 Beav., 625.

as to that. If, however, the court considers that order be in our way, leave can now be given to appeal against it notwithstanding the lapse of time: *Brandon* v. *Brandon* (1); and we ask for such leave.

[It was ultimately arranged that to avoid the necessity of an appeal being presented, the case should be treated irrespective of the order on further consideration.]

This being a petition by a trustee, the court, even if opposed to his claim as regards the beneficial interest, ought to have distributed the fund, and not merely dismissed the petition.

Glasse, Q.C., and *F. Vaughn Hawkins*, for the respondent: We contend that the Vice-Chancellor was right in holding that as renewal is impossible the fund belongs to the tenant for life: *Colegrove* v. *Manby* (2); *Richardson* v. *Moore* (3); *Tardiff* v. *Robinson*, in which the trust was imperative. The report of **In re Money's Trust* in [334 the Law Journal (4) shows that the lease there was renewable. The authorities are summed up in our favor in Lewin on Trusts (5). *In re Wood's Trusts* (6) and *Hollier* v. *Burne* (7) do not agree with the current of prior authorities. The trustees ought not to exercise the power of renewal unless it is beneficial, and so as not to alter the rights of the successive takers: *Milsington* v. *Mulgrave* (8); *Mortimer* v. *Watts* (9); *Lord* v. *Godfrey* (10). The income is not here given to the tenant for life with the exception of a yearly sum for renewal, but subject to a yearly charge for that purpose, and the renewal having become impossible the charge sinks into the estate: *Re Cooper's Trusts* (11); *Tucker* v. *Kayess* (12); *Fisk* v. *Attorney-General* (13). There is no trust for sale, only a power, and the power of sale ought not to be exercised unless the circumstances are such that an absolute owner would think it advisable to sell. *Tardiff* v. *Robinson* (14) is recognized in *Colegrove* v. *Manby* (2), and in *Bennett* v. *Colley* (15).

Hastings, in reply.

July 11. BAGGALLAY, J.A.: The question involved in this appeal is as to the respective rights of persons entitled under the will of the Rev. John Maddy to estates for life

(1) 7 D. M. & G., 365.
(2) 6 Madd., 72; 2 Russ., 238.
(3) Cited 6 Madd., 83, n.
(4) 31 L. J. (Ch.), 496.
(5) 4th ed., p. 276.
(6) Law Rep., 10 Eq., 572.
(7) Ibid., 16 Eq., 163.
(8) 3 Madd., 491.
(9) 14 Beav., 616.
(10) 4 Madd., 455.
(11) 4 D. M. & G., 757.
(12) 4 K. & J., 339.
(13) Law Rep., 4 Eq., 521.
(14) 27 Beav., 629, n.
(15) 2 My. & K., 225.

and in remainder in certain leaseholds held under the Dean and Chapter of Ely, which were renewable at the respective dates of the testator's will and of his decease, but which can no longer be renewed by reason of the reversion having become vested in the Ecclesiastical Commissioners.

The testator, John Maddy, by his will, dated the 16th of June, 1851, gave to his executors his share of the great tithes, or commutation rent charge in lieu of tithes, arising
335] out of the parishes *of Holy Trinity and St. Mary, in Ely, to which he expressed himself to be entitled under a lease from the Dean and Chapter of Ely, upon trust to renew the lease from time to time out of the proceeds of the said tithes, and to divide the surplus annually during the life of his wife equally between her and four of his grandchildren, and he directed that, after the decease of his said wife, the said tithes should become part of his residuary estate; he further empowered his executors, at any time after his decease, if they saw fit, to sell the said tithes or rent charge, and to invest the proceeds in consols; and he gave all his residuary estate in trust for his aforesaid four grandchildren and two other grandchildren, viz., the present petitioner, Mr. Hewett, and the defendant Emily Burlton. At the time of his decease the testator was equitably entitled to one equal tenth part of the rectory of Holy Trinity and St. Mary the Virgin, and of certain glebe lands and tithes of the said rectory, the entirety whereof were vested in trustees for the remainder of a term of twenty-one years from the 29th of September, 1838, upon certain trusts for obtaining the renewal of the lease from time to time, and for raising out of the rents and profits of the property leased, or by mortgage thereof, the necessary fines for renewal; and, subject thereto, upon trust for certain persons in certain shares, being, as to one-tenth part thereof, in trust for the testator, John Maddy. In the year 1859, and again in 1866, the trustees renewed the lease; and, on the latter occasion, the renewal was effected by two leases, one of the tithes and the other of the glebe lands, each being for a term of twenty-one years from the 29th of September, 1866. One equal tenth part of the fines and expenses required for the renewals of 1859 and 1866 was contributed by deductions from the income of testator's share.

Since the renewal of 1866 the trustees of the will of the testator have raised and accumulated out of the profits of the testator's share a fund for renewal of the leases of that date, and such fund now amounts to £1,003 6*s.* 7*d.* Consolidated Bank Annuities; but the reversion of the said

leases having become vested in the Ecclesiastical Commissioners, it is now impossible to procure any further renewal, and the leases will expire in 1887.

A state of circumstances has thus arisen in which it is *impossible to literally comply with the directions [336 contained in the testator's will; and the actual question for decision is, in what way should the leaseholds and the accumulated fund be respectively dealt with? The Vice-Chancellor was of opinion that the tenants for life were entitled to enjoy the leaseholds in specie, and were also entitled to the whole of the renewal fund, and he dismissed with costs the petition of Mr. Hewett, which prayed in effect for a sale of the leaseholds, and that the produce of such sale and the renewal fund should be treated as corpus, and dealt with accordingly under the trusts of the will.

From that decision the present appeal is brought.

It should be mentioned that, upon the hearing of the cause on further consideration on the 20th of April, 1857, an order was made directing the trustees to retain out of income, and invest annually until the year 1859, such a sum as would be sufficient to provide a fund for the renewal of the leases, and to pay the surplus of the income to the tenants for life, and also to pay to them the surplus of the accumulated fund, if such fund should be more than sufficient for such renewal; and it was by the said order further directed that, after the year 1859, the trustees should, during the life of the testator's widow, divide the whole of the surplus of the tithe rent charge between the tenants for life without making any deduction for renewal.

The substantial question raised by the present appeal would appear to be materially affected, if not substantially decided, by the order so made on further consideration, and from which there was no appeal; but, leave having been asked by the present appellants to appeal against that order, notwithstanding the lapse of time, it has been agreed that the whole matter shall now be disposed of, as if the order on further consideration was now under appeal.

Now in this case, as in all other cases of the same description, it is the duty of the court to ascertain what was the paramount object of the testator in the dispositions made by him; were such dispositions, so far as they provided for renewal, simply of a permissive or discretionary character, or did he intend that, upon the death of the tenant for life, the remainderman should succeed to the enjoyment, as nearly as might be, of the corpus of the same

337] *property as that to the income of which the tenant for life was entitled.

This was the test applied, and I think correctly applied, by Lord Justice James, when Vice-Chancellor, in *In re Wood's Estate* (1). In that case the testator directed that a portion of the rental to be derived from his leasehold property, held under the Dean and Chapter of Westminster, should be set apart as a renewal fund, so that the estates might be always kept renewed, and then devised it upon trusts which were in effect for his wife for life, and after her decease for his children. The property was held under two leases, which by practice and usage were renewable every fourteen years; one was renewed in 1856 and the other in 1864, so that the usual times for renewal would have been for the one in 1870, and for the other in 1878. In 1865 and 1866 a railway company, acting under parliamentary powers, gave notices to purchase certain parts of the leaseholds; and as the purchase-moneys, when invested in consols, produced a diminished income, the question was, whether the tenant for life was entitled to be recouped the deficiency out of the corpus of the fund. The Vice-Chancellor was of opinion that the paramount object of the testator was to have the estate renewed for the equal benefit of all the persons entitled in succession, and held that the tenant for life was only entitled to the income produced by the investment of the purchase-moneys.

It may be noted that in the case of *In re Wood's Estate* the notices were served by the railway company before the right to the reversion had passed to the Ecclesiastical Commissioners, and the leaseholds were consequently converted into consols through the act of the Legislature. It thus illustrated, in the simplest manner, the principle upon which a court of equity would act, when dealing with successive interests in leaseholds, which have been forcibly converted into the equivalent of a fee simple estate, instead of being perpetually renewed in the manner directed by the testator.

The same principle was acted upon by Lord Selborne in *Hollier* v. *Burne* (2); in that case the testator, after bequeathing leaseholds held under the Dean and Chapter of
338] Bristol in trust for his *daughter for life, and after her death for her four children, authorized his trustees to set apart an annual sum for renewal, with directions that, if the annual sum so set apart was not sufficient for that purpose, the deficiency should be made up by the persons for

(1) Law Rep., 10 Eq., 572.

(2) Law Rep., 16 Eq., 163.

the time being entitled to the income; the will also contained an absolute power for the trustees to sell the estate. The reversion became vested in the Ecclesiastical Commissioners, who declined to renew, but were willing to sell the reversion in part of the property in consideration of the surrender of the lease of the rest and the payment of a sum of money; and, upon the application of one of the parties entitled in the reversion, Lord Selborne, being of opinion that the trusts for renewal were paramount to the interest of the tenant for life, held that the proposed arrangement was within the powers conferred by the will and the statute 23 & 24 Vict. c. 124, and that the court had power to carry it into effect, notwithstanding the opposition of the tenant for life, who opposed it on the ground that her income would be greatly diminished.

If, then, the same test is applied to the present case as was applied by the Lord Justice in *In re Wood's Estate* (1), and by Lord Selborne in *Hollier* v. *Burne* (2), and we proceed to inquire what was the paramount intention of the testator, as indicated by the dispositions made by his will, it appears to me impossible to arrive at any other conclusion than that he intended that those entitled in reversion expectant upon the decease of his wife should succeed to the enjoyment of substantially the same estate as that the income of which was to be enjoyed by those designated to take it during his wife's life. The circumstances of the present case would appear to be almost stronger in favor of this view than they were in either of the cases to which I have referred; the first trust declared by the will is that the trustees should from time to time renew, and raise the necessary funds out of income, and it is only in respect of the property, so from time to time renewed, at the cost of income, that the testator proceeds to declare trusts in favor of the beneficiaries, and this view of the case is strengthened by the fact that an absolute power of sale is conferred upon the trustees.

*The Vice-Chancellor appears to have been of [339 opinion that the point raised upon this petition had been expressly decided by Lord Eldon in *Tardiff* v. *Robinson* (3), and that that decision had been followed by Vice-Chancellor Kindersley in *In re Money's Trust* (4), and by Lord Romilly in *Morres* v. *Hodges* (5), and that the only case in which it had not been followed was that decided by the Lord Justice, to

(1) Law Rep., 10 Eq., 572.
(2) Law Rep., 16 Eq., 163.
(3) 27 Beav., 629, n.
(4) 2 Dr. & Sm., 94.
(5) 27 Beav., 625.

which reference has already been made, *In re Wood's Estate* (1). Now, in *Tardiff* v. *Robinson* certain Crown leaseholds were settled by deed (not by will) upon trust for the Countess Tardiff for life, with remainder as she should appoint, and with a proviso that it should be lawful for the trustees, at the usual and ascertained times, and at the request of the Countess during her coverture, and afterwards at their own discretion, to renew the lease, and to raise the fines out of the rents or by mortgage; and the Countess, by her will, appointed the funds, subject to the payment of certain sums, to her husband for life, with limitations over. It will be observed that the trusts or directions for renewal were in the deed only, though a further fund was provided by the will for payment of the fines.

In such a case it appears to me that it would have been impossible to hold that there was any overriding trust for renewal. Not only was the question whether there should be a renewal or not left after the death of the Countess to the discretion of the trustees, and it was not until after her death that the question arose; but they were in any event bound by the strict terms of their trust, which conferred upon them the power of raising money to renew at the usual and accustomed times, and at those times only; and the Crown having absolutely refused to renew, such times could never arrive. Lord Eldon accordingly declared that as no renewal could be obtained, no accumulation of the rents and profits could take place. It is immaterial to consider whether, if the trusts in that case had been created by will instead of by deed, a different conclusion might not have been arrived at. The decision in *Richardson* v. *Moore* (2), which had reference to the same property, de-
340] pended upon the provisions of an earlier deed of *settlement, but such provisions did not substantially differ from those which had to be considered in *Tardiff* v. *Robinson* (3).

As regards *In re Money's Trust* (4), it does not appear from the reports whether the will contained any trusts or directions for renewal, and the Vice-Chancellor Kindersley appears to have decided the case on the authority of Lord Romilly's decision in *Morres* v. *Hodges* (5), in which case Lord Romilly considered himself bound by Lord Eldon's decision in *Tardiff* v. *Robinson*. It is also to be noted, that in *Morres* v. *Hodges* the question arose upon a deed,

(1) Law Rep., 10 Eq., 572.
(2) Cited in 6 Madd., 83, n.
(3) 27 Beav., 629, n.
(4) 2 Dr. & Sm., 94.
(5) 27 Beav., 625.

and that there was no express trust to renew, but only a direction to the trustees to use their best endeavors to renew.

Hayward v. *Pile* (1) was also cited by the respondents; but in that case, also, there was no absolute trust for renewal; the trusts were that the trustees should, if they thought fit, but not otherwise, at the usual times and periods, or at such other times or periods as they should deem expedient, procure a renewal of the leases, and should for that purpose raise money as therein mentioned.

Upon a full consideration of all these cases I have come to the conclusion that the cases of *Richardson* v. *Moore* (2), *Tardiff* v. *Robinson*, *Morres* v. *Hodges*, and *Hayward* v. *Pile* are distinguishable from those of *In re Wood's Estate* (3), *Hollier* v. *Burne* (4), and that now under consideration; in no one of the former was there, whilst in each of the latter there was, a predominant trust for renewal overriding the dispositions in favor of the successive beneficiaries.

The intention of the testator being thus ascertained, the question remains, How can that intention be best effectuated?

The decisions in *In re Wood's Estate* and *Hollier* v. *Burne* would indicate that the strictly correct course to have followed would have been for the trustees to have exercised their power of sale over the leaseholds as soon as it was ascertained that the leaseholds could not be again renewed, a period corresponding in the present case with that of the last renewal, viz., in 1866; and, had *the power [341 been so exercised, the beneficiaries during the life of the widow would have been entitled to the income arising from the investment of the amount so produced.

This course, however, was not followed; but a certain sum has been annually retained by the trustees, equivalent, as I understand, to the amount which would have been properly retained for the purpose of renewal, had renewal been still possible. If the amount so retained was accurately ascertained, and there appears to be no reason to doubt that such was the case, the aggregate of the produce of a sale now to be effected, and of the accumulations until sale, would substantially represent the value of the leaseholds at the time when they ceased to be renewable.

The result is, that the order of the Vice-Chancellor should

(1) Law Rep., 5 Ch., 214.
(2) Cited in 6 Madd., 83, n.
(3) Law Rep., 10 Eq., 572.
(4) Law Rep., 16 Eq., 163.

be discharged, and an order should be made in accordance with the prayer of Mr. Hewett's petition.

The order should contain a recital to the effect that the order on further consideration was by consent treated as under appeal.

The costs of all parties should be paid out of the fund.

LUSH, J., concurred.

JAMES, L.J.: I have reconsidered the case of *In re Wood's Estate* (1), with the observations of the Vice-Chancellor upon it, and have had an opportunity of reading the judgment now delivered, which is in my opinion correct.

Solicitors: *White, Renard & Co.; Shoubridge; Berkeley; John Murray; J. E. Fox & Co.*, agents for Turner & Poole, Taunton.

(1) Law Rep., 10 Eq., 572.

[3 Chancery Division, 342.]

V.C.H., March 13: C.A., July 7, 14, 1876.

342] *POCOCK V. ATTORNEY-GENERAL.

[1875 P. 110.]

Will—Charitable Gift—Fund to be distributed at the Discretion of Executors.

A testator directed that a fund of personalty over which he had a general power of appointment should, unless otherwise specifically disposed of by a codicil, become part of his residuary estate. By a codicil he gave out of this fund various charitable legacies, and directed that the residue of the fund should be given by his executors to the charitable institutions to which he should by any future codicil give the same, "and in default of any such gift, then to be distributed by my executors at their discretion." He made no subsequent codicil:

Held (affirming the decision of Hall, V.C.), that the ultimate trust in the codicil was that the residue should be distributed by the executors among charitable institutions at their discretion, and that a trust in favor of charity was created.

J. J. POCOCK, having a general testamentary power of disposition, subject to a prior life interest in his wife, over certain insurance and other moneys and funds subject to the trusts of his marriage settlement, by will in November, 1861, made sundry devises and bequests, and confirmed the settlement, and after directing that the sum of £5,000 Reduced £3 per Cent. Annuities should, at the death of his wife, be transferred to his nephew (the plaintiff), proceeded as follows:

"And as to all the insurance and other moneys, stocks, funds, or securities, subject to the trusts of my said settlement over which I have any power of disposition, I direct that the same, unless otherwise specifically disposed of by a codicil to this my will, shall sink into and become part of

my residuary estate hereinafter disposed of, and I appoint, give, and bequeath the same accordingly."

The testator then, subject as aforesaid, gave all his real and personal estate to the plaintiff and two others, their heirs, executors, &c., upon trusts for conversion and investment of the residue after satisfying all his debts, funeral and testamentary expenses, and the legacies bequeathed by his will, and any codicil thereto; *and he declared [343 that the trustees of all the aforesaid residuary estates and trust premises should stand seised and possessed thereof upon trust out of the income of the investments to pay certain annuities, and subject thereto to pay the income to his wife for life, and after her decease upon trust to stand possessed of the capital of the same residuary estate and premises, and the annual income thereof, upon and for such trusts as he "should by any codicil to that his will direct or appoint."

By a codicil in December, 1861, the testator made the following dispositions:

"Out of the insurance and other moneys, stocks, funds, or securities subject to the trusts of my marriage settlement, and over which I have any power of disposition at the death of my wife, I give to the respective treasurers or trustees for the time being of the following societies and institutions respectively, and in aid of the funds of the same, out of such part of the said insurance and other moneys or securities as may be lawfully devoted to charitable purposes, the following sums or legacies, clear of legacy duty, that is to say, to the treasurer or trustees for the time being of King's College Hospital, £400; the Society for Promoting Christian Knowledge, £400; the Society for the Propagation of the Gospel in Foreign Parts, £400; and the Society for the Education of the Poor in the Principles of the Church of England, £400; in addition to the sums of £100 given by my will to each of the said societies and institutions; also to the Society for Convalescent Poor at Seaford, in the county of Sussex, the sum of £100; and as to the residue of the said insurance and other moneys, stocks, funds, and securities, I direct the same to be given by my executors to such charitable institutions as I shall by any future codicil give the same, and in default of any such gift then to be distributed by my executors at their discretion."

The testator then proceeded: "And as to my general residuary trust estate, effects, and premises, I give, direct, and appoint the same, after the death of my said wife, to

the persons and in the manner following." He then gave various legacies, and the residue to the plaintiff.

The testator made no further codicil. His widow survived
344] him, *and died in 1875. On her death the questions arose whether the residue of the funds in the marriage settlement was effectually given to charity, and if not, whether it went to the residuary legatee or to the testator's next of kin. A special case was agreed upon for the opinion of the court, and came on to be heard before Vice-Chancellor Hall on the 13th of March, 1876.

Dickinson, Q.C., and *Bond*, for the plaintiff.

Rigby, for the Attorney-General.

A. Thomson, for the next of kin.

R. O. Turner, for the other executor.

HALL, V.C.: This case has been extremely well argued on all sides, and a question of some nicety and difficulty has presented itself.

The scheme of the will is this: [His Lordship read the material parts of the will.]

Under that will the insurance moneys were included in the residuary gift to the three persons named, who were also executors, and they would take the insurance moneys in their character of executors in the first instance, and in the next instance in their character of residuary legatees in trust, subject only to such specific dispositions as might be made of them by the testator by any codicil which he might make to his will. The legal title therefore, unquestionably, to those policy moneys would be in those persons, the executors and trustees.

He then made a codicil, and in that codicil he takes up the imperfect disposition of the insurance moneys, and out of those insurance moneys he gives to the respective treasurers or trustees for the time being of certain specific societies and institutions certain sums of money. Then he says: "And as to the residue of the said insurance and other moneys, stocks, funds, and securities, I direct the same to be given by my executors to such charitable institutions as I shall by any future codicil give the same, and in default of any such gift, then to be distributed by my executors at their discretion."

The disposition made by the testator's will of his general
345] estate *was very incomplete, his general estate being only disposed of to the extent of providing for debts, legacies, and annuities, and giving his wife a life interest in the residue, and subject to that he contemplated its being disposed of by a codicil. In this codicil he gives out of the

general residue, after the death of his wife, certain legacies, and gives the residue, after payment of those legacies, to the nephew, who is also one of the residuary legatees in the codicil. We must therefore, first of all, as regards the residuary general estate, read the will and codicil together, by reading the will as containing this disposition of the residue in the place of that portion of the will which directs the trustees to stand possessed of the corpus after the death of the wife upon such trusts as he should by any codicil direct. I insert, therefore, into the will, after the gift of the life interest to the wife, this disposition, which is contained in the codicil, of the general residue, and that makes a perfect disposition of the general estate.

Having so completed the disposition of the general estate by means of the codicil, I must read the will with reference to the insurance moneys, having regard to its disposition of the general residue, as completed by means of the codicil. Then the disposition of the insurance moneys amounts to this, that by force of the will and codicil taken together, they are given to the nephew, except so far as they are specifically bequeathed, because the general estate is given to him, and the insurance moneys are directed to go along with the residue, except in so far as they are specifically bequeathed.

The effect of that is to displace the contention which has been put forward on behalf of Mr. Thomson's clients. I find by force of the two documents taken together a complete disposition, except in so far as the property is specifically bequeathed by any codicil to the testator's will.

But that being so, the great and grave question in this case is, whether there is or is not a gift by the codicil of the insurance moneys in favor of charity. Now the argument in favor of charity I conceive to be twofold. One argument is that the property is given to charity because the codicil directs it to be given by the executors to such charitable institutions as the testator should by a future codicil give the same, "and in default of any *such gift, then to [346 be distributed by my executors at their discretion," which disposition, it is said, upon a fair construction of the whole sentence, is a disposition in favor of charity altogether. Then it is said that, independently of the mere construction of those particular parts of the codicil, the latter part of that clause is in fact a power in the nature of a trust, which trust was a trust created in favor of charity.

It appears to me that the first contention is enough to dispose of this case, that upon a just and fair construction

of this clause there is in this clause a direction that the property shall go to charity, whether it goes through the medium of a codicil giving it to charity, or whether it goes through the medium of a distribution of the fund made by the executors. I consider that upon a fair construction the disposition amounts to this: "I direct my executors to pay this over to such charitable institutions" (so far the direction goes) "as I shall by any future codicil give the same, and in default of any such gift" (the word "gift" there having reference to the word "give" immediately preceding it), "then to be distributed by my executors at their discretion in pursuance of my direction," which is a direction that "the same shall be given by my executors to such charitable institutions, either as I shall specify by a codicil, or in default thereof, as my executors at their discretion shall distribute it among." I think, upon a fair construction of that sentence, the distribution of the fund is to be in favor of charitable institutions.

If that is the fair, proper, and sound construction of that part of the will, it disposes of the case quite irrespective of any of the authorities which have been referred to, and I think that it is. The sentence begins with a direction, which direction covers the whole of the sentence, not merely that part of it which supposes he may make a codicil, but also the latter part of the direction as to the distribution by the executors at their discretion. He says in effect: "It is to be done at your discretion if I do not do it myself. I may do it myself by a codicil, and my direction is that it shall be given by my executors to such charitable institutions as they shall in their discretion choose to distribute it amongst, unless I myself point out the charitable institutions who are to take the fund."

347] *Then, upon the other ground, it seems to me that upon a fair construction this is a direction amounting to a trust, and a trust to be executed in favor of charity. The testator had contemplated himself selecting the charities by a further codicil. If he had stopped there, there is no doubt that there would have been a trust in favor of charity. That is clear upon the authorities, one of which has been referred to by Mr. Rigby, namely, *Mills* v. *Farmer* (1). But it is said that that is not so because there is a gift over to somebody else, or something which prevents the application of that rule. It does not appear to me that the case is analogous to the case of a power of distribution, or a power of appointment in favor of a class with a gift in default of

(1) 1 Mer., 55.

appointment, not to the class, but to another person. That is a case where you cannot imply a gift from the power itself. You cannot do that, because it is provided that if the power is not exercised the property shall go somewhere else. In that case, therefore, nothing can be implied, but here, there being a power in favor of charity with a direction for distribution in default of particular charities being specified, not saying that they may distribute it among such persons as they may choose to select—but it is to be a distribution, and, as I conceive, a distribution with reference to the obvious and clearly manifest intent to be derived from the earlier part, viz., a distribution for charitable purposes, which are left undefined and incomplete merely by reason of the testator not having made a codicil. It appears to me that the legal title being in the executors, as well by reason of their being executors as by reason of the gift in the will (subject to any special disposition), they taking the legal title, there is really no difficulty whatever by reason of there being contained in this instrument that which has been described as being an actual disposition of the beneficial interest.

In most, if not all, of the cases where a power though not exercised has been held to confer a benefical interest on its objects, it is true that the property has been given to certain persons, sometimes to a person who upon a true construction of the will is only to take beneficially for life, and then there follows a provision about distribution in the form of a power. In those cases, although *the whole interest [348 has been given to the person who upon construction takes beneficially for life only, there has been in reality no disposition whatever of the beneficial interest until you come to the power itself, and therefore there is no other disposition of the beneficial interest except through the medium of the power; and I observe with reference to that, in a case which was referred to where these cases were very much examined, namely, the case of *Burrough* v. *Philcox* (1), that Lord Cottenham examines the cases and comments on the *Duke of Marlborough* v. *Lord Godolphin* (2) in terms which do not add much to its authority. It does not seem to have commended itself to the judgment of the Lord Chancellor, but he refers to more than one case in which there was really no disposition except in the form of a power. *Wilts* v. *Boddington* (3) seems to be a case of that kind. There the gift was only to the wife for life, with power, by her will or otherwise, to give the sum amongst the children. The chil-

(1) 5 My. & Cr., 73. (2) 2 Ves. Sen., 61. (3) 3 Bro. C. C., 95.

dren were held to take in default of appointment by the wife, although there was nothing excepting the life interest given to the wife. There are other cases referred to, but in fact *Burrough* v. *Philcox* itself seems to be a case of that kind. I do not see any substance, therefore, in the ingenious argument which Mr. Dickinson has addressed to me for the purpose of distinguishing this case from *Brown* v. *Higgs* (1), and that class of cases; and it does seem to me that it is impossible to read this direction at the end of the codicil—a direction which applies as well to the direction to pay over the fund to such charities as shall be nominated by a codicil as to the other part, viz., to a distribution by the executors themselves—it is impossible, I think, to read this codicil without seeing that it is a plain direction amounting to a trust in the form of a power or a direction. I should rather treat it as a direction than as a power, or it may be either or both. There is a clear direction, it appears to me, that the executors shall distribute this; and following, as it does, a clear gift in favor of charity and charitable institutions, it appears to me plain on the face of the codicil that there was a duty upon the executors to distribute this fund among charitable institutions in the event, which happened, 349] of the testator *failing to make any distribution or disposition of it by any further codicil.

It seems to me, therefore, that upon the whole there must be a scheme settled for the purpose of disposing of this charitable gift.

The plaintiff appealed, and the appeal came on to be heard on the 5th of July, 1876.

Dickinson, Q.C., and *Bond*, for the appellant: The testator refers to a codicil to be made, and none was made; in default of it he directs that the funds shall be distributed by his executors at their discretion. This cannot be construed to be a gift to them to be disposed of in charity: *Buckle* v. *Bristow* (2); *Aston* v. *Wood* (3). It is, then, a gift which fails for vagueness: *Morice* v. *Bishop of Durham* (4); *James* v. *Allen* (5); *Vezey* v. *Jamson* (6); *Ommanney* v. *Butcher* (7); *Fowler* v. *Garlike* (8); *Ellis* v. *Selby* (9); *Harris* v. *Du Pasquier* (before Vice-Chancellor Wickens, May 27, 1872); *Yeap Cheah Neo* v. *Ong Cheng Neo* (10).

[JAMES, L.J., referred to *Gibbs* v. *Rumsey* (11).]

(1) 5 Ves., 495.
(2) 10 Jur. (N.S.), 1095.
(3) Law Rep., 6 Eq., 419.
(4) 9 Ves., 399; 10 Ves., 522.
(5) 3 Mer., 17.
(6) 1 S. & S., 69.
(7) T. & R., 260.
(8) 1 Russ. & My., 232.
(9) 1 My. & Cr., 286.
(10) Law Rep., 6 P. C., 381.
(11) 2 V. & B., 294.

That decision was disapproved of in *Ellis* v. *Selby* and *Buckle* v. *Bristow*. To hold this a charitable gift would be importing words into the will.

Rigby, for the Attorney-General: The court will not construe a single clause strictly where doing so would defeat the intention shown on the whole bill. *Dolan* v. *M'Dermott* (1) is an instance of this as regards charities. It is shown by *Mills* v. *Farmer* (2) and *Moggridge* v. *Thackwell* (3) that if the testator had stopped short with the direction to pay to such charitable institutions as he should by a future codicil appoint, and had made no future codicil, the property would have been effectually devoted to charity. This being clear, the court will not undo it unless there is something clear the other way. On a *fair [350 construction, the vague direction at the end of the codicil means that the executors are to give to such charities as they shall think fit; it contains no express reference to persons, and it is inconceivable that the testator departed from his charitable intentions in the middle of a sentence.

[He was here stopped by the court.]

Bond, in reply.

JAMES, L.J.: I am of opinion that the decision of the Vice-Chancellor must be affirmed. If this will had come before the court for the first time, and the court, unfettered by decision and unfettered by rules of construction, had to consider, without reference to consequences, what the intention of the testator was in using the words, "I direct the same to be given by my executors to such charitable institutions as I shall by any future codicil give the same, and in default of any such gift then to be distributed by my executors at their discretion," the court would have held the plain reasonable construction of the clause to be that the testator meant the discretion of his executors to be a substitute for his own in choosing the charities. The introduction of the words "charitable institutions" could have no effect on a future codicil, and the testator, therefore, had no object in mentioning them, except that of showing that charity was his object, and showing his meaning to be that if he did not name the charities his executors were to do so. The fair construction is, that the gift is to charitable institutions to be chosen by himself, and in default of such choice, then by his executors. And then if we look at *Mills* v. *Farmer* (2) and *Moggridge* v. *Thackwell* (3), we find that a gift to such charitable institutions as the testator shall by codicil appoint, is, without more, a clear gift to charity, though no

(1) Law Rep., 3 Ch., 676. (2) 1 Mer., 55. (3) 7 Ves., 36.

codicil is made. When a clear gift is thus made, clear words are needed to take it away, and it cannot be taken away by mere words of distribution by the executors.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *Chapman, Turner & Pritchard; Currey & Holland; Raven & Hare.*

[3 Chancery Division, 351.]

V.C.H., Jan. 13: C.A., July 18, 1876.

351] *ROGERS v. INGHAM.

[1875 R. 57.]

Mistake of Law—Payment—Assent—Repayment.

The court will not in all cases relieve against a payment of money under mistake of law.

An executor, acting on the advice of counsel on the construction of a will, proposed to divide in certain proportions a fund between two legatees. One of the legatees being dissatisfied took the opinion of counsel, which agreed with the former opinion. The executor then divided and paid over the fund in accordance with the opinions. Two years afterwards the dissatisfied legatee filed a bill against the executor and the other legatee, alleging that the will had been wrongly construed, and claiming repayment from the other legatee:

***Held* (affirming the decision of Hall, V.C.), that the suit could not be maintained.**

Davis* v. *Morier (1) **distinguished.**

JOHN INGHAM, by his will, bequeathed the residue of his estate to W. Taylor and W. Ingham upon trust to divide the same between his children and their children as therein mentioned. He died in 1847, and his will was proved by W. Taylor and W. Ingham. In 1866 Mary Rogers, one of the testator's children who had under the will an estate for life in one-fourth of the estate, died, leaving her surviving two children, Martha Rogers and R. R. Rogers, and also Thomas Wheatley, husband and administrator of Hester Wheatley, another child who had died in the lifetime of Mary Rogers. W. Ingham, who had survived W. Taylor, paid the interest in that one-fourth of the estate for some time equally between Martha Rogers and R. R. Rogers, being of opinion that the share of Hester Wheatley had gone to them as survivors, and after the death of R. R. Rogers he paid the interest to Martha Rogers as surviving. W. Ingham then died, and J. W. Ingham took out letters of administration to his estate. J. W. Ingham took the opinion of counsel on the will, and was advised that the share of Hester Wheatley did not survive, but had become vested in her and passed to her husband as administrator, and conse-

(1) 2 Coll., 303.

quently *that the interest had been paid to Martha [352
Rogers in error. Her solicitors took the opinion of another counsel, and wrote to the solicitors of J. W. Ingham as follows:

"We have taken an opinion on this matter, and may as well state it confirms the opinion of your counsel, but whether our client will be satisfied or not with it we cannot say. It is certainly a very great disappointment to her, and will be very hard indeed should Mr. Ingham and Mr. Wheatley insist on making the deductions you propose. Surely Mr. Wheatley will not look for the whole of the arrears of interest being paid to him. You must admit it is a very hard case as far as Mrs. Rogers is concerned. Will you kindly see your clients and write us what they are inclined to do, and we will endeavor to bring the matter to a conclusion at the end of the week."

The solicitors of Mr. Ingham however made out an account of the whole estate, debiting Martha Rogers with interest as paid to her in mistake, making £274 16*s.* 7*d.* as due to her from the estate of John Ingham. Some more letters as to the accounts passed, and on the 2d of July, 1873, a check for £274 16*s.* 7*d.* was sent for Martha Rogers, and the receipt was acknowledged by her solicitors. At the same time £454 15*s.* 3*d.* was paid to Thomas Wheatley as the share of Hester Wheatley, with the arrears of interest paid to Martha Rogers as by mistake.

On the 14th of June, 1875, Martha Rogers filed her bill against J. W. Ingham and Thomas Wheatley, stating the will of W. Ingham, and submitting that on the true construction of the will the share did not vest in Hester Wheatley, but passed to R. R. Rogers (to whom Martha Rogers was administratrix) and Martha Rogers as surviving, and praying that Thomas Wheatley might be ordered to repay the same with interest.

The suit came on for hearing before Vice-Chancellor Hall on the 13th of January, 1876.

Dickinson, Q.C., and *Eyre Thompson*, for the plaintiff.

Hastings, Q.C., and *Hanson*, for Wheatley, took the objection that the whole matter had been concluded in 1873.

*Hall, V.C.: It appears to me that the plaintiff [353
is not entitled to recall the money which was paid over to the defendant Wheatley under the circumstances which are disclosed in his answer. [His Lordship then stated the facts of the case.] There being a family dispute between the parties as to the true construction of this will, in order no doubt to avoid litigation, the fund was divided in a given

way. That having taken place on the 2d of July, 1873, upon the 12th of August, 1875, two years afterwards, this bill is filed to raise the question of construction which had been the subject of discussion between the parties, and upon which two opinions had been taken, these two opinions agreeing as to the construction of the will.

There has up to this time been no judicial determination to the contrary, and I think that the court should not, under the circumstances, put a judicial construction upon the will. It seems to me that the fund was divided as a matter of arrangement between the parties, and that having taken place more than two years before the bill was filed, I ought not to give the assistance of this court for the purpose of recalling that fund from the defendant, who received it upon the faith and footing of what took place on that occasion. This has been acquiesced in, and the executor has been permitted to distribute the fund accordingly, which fund, for aught I know, Wheatley may have spent, and may not be in a position to restore. Under these circumstances, it appears to me that the plaintiff's case fails, and taking that view, it is not necessary for me to determine—nor do I determine—what is the true construction of the will.

The plaintiff appealed, and the appeal came on to be heard on the 18th of July, 1876.

Dickinson, Q.C., and *Eyre Thompson*, for the appellant: This was not in any way a compromise, but a clear mistake by a trustee, and as such must be rectified: *Bingham* v. *Bingham* (1); *Naylor* v. *Winch* (2). In *Clifton* v. *Cock-*
354] *burn* (3) there had been *long acquiescence. It was a common mistake under the advice of counsel: *Cooper* v. *Phibbs* (4). Payment by my trustee is payment by me, and I ought to recover the money: *Davis* v. *Morier* (5). A court of equity can relieve against the consequences of a mistake of law; moreover this is hardly a pure question of law: *Stone* v. *Godfrey* (6); *Bullock* v. *Downes* (7); *In re Condon* (8).

Hastings, Q.C., and *Hanson*, for the defendant Wheatley: This is in fact an action for money had and received, but no such action will lie on a mistake of law when all parties knew the facts: *Brisbane* v. *Dacres* (9); *Midland Great Western Railway Company of Ireland* v. *Johnson* (10); *Stewart* v. *Stewart* (11). This is not a suit to set aside a com-

(1) 1 Ves. Sen., 126.
(2) 1 S. & S., 555.
(3) 3 My. & K., 76.
(4) Law Rep., 2 H. L., 149.
(5) 2 Coll., 303.
(6) 5 D. M. & G., 76.
(7) 9 H. L. C., 1.
(8) Law Rep., 9 Ch., 609.
(9) 5 Taunt., 143.
(10) 6 H. L. C., 798.
(11) 6 Cl. & F., 911.

promise; this defendant is a stranger to the plaintiff, and the only case made is that the defendant has received from a third person money which the plaintiff says ought to have been paid to her, but the money is not ear-marked, and cannot be followed in this way. This defendant is not a trustee for the plaintiff, and there is no case of conscience against him, and there is no more case in equity than at law. *Reg.* v. *Lords Commissioners of the Treasury* (1) was a much stronger case.

Dickinson, in reply.

JAMES, L.J.: I am of opinion that the judgment of the Vice-Chancellor ought to be affirmed.

In arriving at that conclusion I entirely put aside anything that has been said about any supposed or conditional consideration connected with the matter. It really is to be looked at as between the two persons who alone are now in litigation before us, that is, the plaintiff on the one part, and Wheatley on the *other part; and the greater por- [355 tion of the argument seems to me to be disposed of by this consideration, that there really is no question of trust, trust estate or trust money, to be dealt with. When a trustee, by the direction or with the authority of his *cestui que trust*, pays money to a third person, no matter under what claim of right or under what circumstances, it is exactly the same as if the *cestui que trust* had received the money from the trustee, and had herself paid it to that person. It is simply a question of money paid by the lady, or by the lady's direction, out of money of hers which the trustee had in hand to a person who said that he had a claim to the money.

That being so, it is reduced, as it appears to me, to a mere action for money had and received, and it is the same as if A. through a third person had paid money to B., thinking that B. was entitled to it, B. thinking also that he was entitled to it; there having been, as it is now said, a mistake of law which was common to both parties. No authority whatever has been cited to us in support of the proposition that an action for money had and received would lie against a person who has received money from another, with perfect knowledge of all the facts common to both, merely because it was said that the claim to the money was not well founded in point of law. Of course cases of that kind must have continually occurred, and yet no case has been produced in which a suit of this kind has succeeded. And really when it is treated as the common case of money paid to B. under

(1) 16 Q. B., 357.

a mistake, the law on the subject was exactly the same in the old Court of Chancery as in the old Courts of Common Law. There were no more equities affecting the conscience of the person receiving the money in the one court than in the other court, for the action for money had and received proceeded upon equitable considerations. Here the money has got into the hands of one person, and he received it honestly, with no mistake on his part, and no mistake on the part of the lady or of the trustee, the intermediate hand through whom the money passed and by whom it was actually paid.

I have no doubt that there are some cases which have been relied on, in which this court has not adhered strictly to the rule that a mistake in law is not always incapable of 356] being *remedied in this court; but relief has never been given in the case of a simple money demand by one person against another, there being between those two person no fiduciary relation whatever, and no equity to supervene by reason of the conduct of either of the parties.

It is said that there have been two cases of that kind. In *Bingham* v. *Bingham* (1) a man was held to be entitled to get his money back when he had paid it for a conveyance of his own land from another person. It was held in that case that he was entitled to recover back the money because he had not the consideration for which he had bargained. The other case is *Davis* v. *Morier* (2), where the relation of trustee and *cestui que trust* existed between the parties; but when the facts of that case come to be looked into, the person who received the whole income of the fund on trust to apply the same properly, and who was the trustee, retained to himself all, except £500 a year, and it appeared that the £500 a year was not all that he ought to have paid to the *cestui que trust*, and that being so the Vice-Chancellor Knight Bruce directed an inquiry: first, as to whether he had retained more than he ought to have retained, and secondly, under what circumstances and whether the other *cestuis que trust* had in any manner assented to such retainer, that is to say, had acquiesced in it so as to show whether they had given it up. Therefore there was there a question of a *cestui que trust* against a trustee, which trustee, no doubt under mistake, had retained trust money in his own possession.

That is the nearest case that I have been able to find to the case now before us, but that case is far from establish-

(1) 1 Ves. Sen., 126. (2) 2 Coll., 393.

ing the proposition contended for. If that proposition were true in respect of this case it must be true in respect to every case in the High Court of Justice where money has been paid under a mistake as to legal rights, and it would open a fearful amount of litigation and evil in the cases of distribution of estates, and it would be difficult to say what limit could be placed to this kind of claim, if it could be made after an executor or trustee had distributed the whole estate among the persons supposed to be entitled, every one of them having knowledge of all the facts, *and having given [357 a release. The thing has never been done, and it is not a thing which in my opinion is to be encouraged. Where people have a knowledge of all the facts, and take advice, and whether they get proper advice or not, the money is divided and the business is settled, it is not for the good of mankind that it should be reopened by one of the parties saying: "You have received your money by mistake, I acquiesced in your receipt of it under that mistake, and, therefore, I ask you to give it to me back." I am of opinion, therefore, that the decision of the Vice-Chancellor is perfectly correct and ought to be affirmed.

MELLISH, L.J.: I am entirely of the same opinion. There is no doubt as to the rule of law that money paid with a full knowledge of all the facts, although it may be under a mistake of law on the part of both parties, cannot be recovered back; and I think it is equally clear that, as a general rule, the Court of Equity did not, in such cases, interfere with the courts of law. Nothing, in my opinion, would be more mischievous than for us to say that money paid, for instance, under a mercantile contract, according to the construction which the parties themselves put upon that contract, might, years afterwards, be recovered, because perhaps some court of justice, upon a similar contract, gave to it a different construction from that which the parties had put on it. I think there is no doubt that the rule at law is in itself an equitable and just rule which is not interfered with by courts of equity; but, on the other hand, I think that, no doubt, as was said by Lord Justice Turner, "This court has power (as I feel no doubt that it has) to relieve against mistakes in law as well as against mistakes in fact" (1); that is to say, if there is any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it.

(1) *Stone* v. *Godfrey*, 5 D. M. & G., 90.

Now, is there any such ground in this case? It appears that there was a trustee in possession of a fund which belonged either to the plaintiff or to the defendant. All the facts were perfectly well known; the trustee was in com-
358] munication with both parties; *both parties were well aware that the question was then to be decided; the plaintiff's attention and the attention of the plaintiff's legal advisers were called to all the facts and circumstances; she took advice upon the point, and she and her advisers being all of them aware that if she had not assented to the view that the trustee took, the natural consequence would be that the money would have been paid into court under the Trustee Relief Act, and that she would have been obliged to have the question then decided. Therefore, having all the facts before her, and before her solicitors, and being advised, she thinks it better for her not to contest the matter, but to allow it to be settled in that way; and there is no doubt that she was advised properly. Thereupon the money was divided, and of course would not be paid into court, and the matter would not be litigated. Then the question is, whether a person who has acted in this way is now entitled, because she has changed her mind, to litigate this question, which before she had been advised and had determined not to litigate. It seems to me that it would be contrary to the ordinary rule of law; and that the defendant is entitled to say, "I received this money believing it to be my own; the person by whose direction it was paid was the counter claimant against me; she knew all the facts, and elected at the time not to litigate the question, and therefore I have received the money just as if the question had been determined in open court." In my opinion, it would be most unsafe to estates in general if we were to hold in a case of this kind that money paid under those circumstances could be got back; I agree, therefore, with the Lord Justice in thinking that the judgment of the Vice-Chancellor ought to be affirmed.

BAGGALLAY, J.A.: I am of the same opinion, and I merely wish to add that while I give a general assent to the passage in the judgment of Lord Brougham (1), which has been referred to in the course of the argument, in which he expressed himself to the effect that cases might arise in which it would be the duty of the court to relieve against an error of law, I do not think that the present is a proper case for the application of such a principle.

(1) 3 My. & K., 99.

*JAMES, L.J.: The appeal will be dismissed with [359 costs.

Solicitor for plaintiff: *F. Last*, agent for Barrell & Rodway, Liverpool.

Solicitors for defendant: *Paterson, Snow & Burney*, agents for Dibb, Atkinson & Braithwaite, Leeds.

See Moak's Van Santv. Pl., titles "Mistake," "Reformation of Contracts."

Courts of equity will relieve against mistake, and will correct and reform deeds and instruments of the most solemn character to grant such relief: Burgin *v.* Giberson, 26 N. J. Eq., 72.

But when relief is sought from deeds or other writings, the mistake must be clearly proved: Burgin *v.* Giberson, 26 N. J. Eq., 72; 1 Sto. Eq. Jur., § 152; Sutherland *v.* Sutherland, 69 Ills., 481; Neff *v.* Rains, 33 Wisc., 689; Luddington *v.* Ford, 33 Mich., 123.

A reformation of a contract can only be had when both parties have executed an instrument under a common mistake, and have done what neither of them intended. A mistake on one side only may be ground for rescinding, but not for correcting, an agreement: Sutherland *v.* Sutherland, 69 Ills., 481; Wilson *v.* Byers, 77 Ills., 76; Ford *v.* Loomis, 33 Mich., 121; Luddington *v.* Ford, 33 Mich., 123; Ogilvie *v.* Squair, 10 Grant's (U. C.) Chy., 444; Cottingham *v.* Boulton, 6 Grant's (U. C.) Chy., 186.

And there must have been a clear definite agreement, not a vague or indefinite one: Wright *v.* Wright, 31 Michigan, 380; Arran *v.* Amabel, 17 Grant's (U. C.) Chy., 163.

On the separation of three townships into two municipalities, the two corporations executed an instrument whereby the one agreed to pay to the other a certain sum as soon as certain non-resident rates theretofore imposed should become available. It was subsequently discovered that these rates had been illegally imposed, and that the supposed fund would never be available; its supposed existence had been an element in determining the amount to be paid: Held, that the corporation to which the money was to be paid, was not entitled to have the agreement altered so as to make the money payable by the other absolutely: Arran *v.* Amabel, 17 Grant's (U. C.) Chy., 163.

A written instrument will not, ordinarily, be reformed merely for a mistake of the person executing it as to its *legal effect*, he being acquainted at the time with its contents: Neff *v.* Rains, 33 Wisc., 689; Gerald *v.* Elley, 45 Iowa, 322.

See Ledyard *v.* Phillips, 32 Mich., 13; Blakeman *v.* Blakeman, 39 Conn., 320.

A concealment or misstatement of the law may operate as a fraud, from which the party should be relieved. That is more than a mistake of the law; it is a fraud by the other party to the contract: Cooke *v.* Nathan, 16 Barb., 342; Ladd *v.* Rice, 57 N. H., 374; Boyd *v.* Dela Montagnie, 4 Thomp. & Cooke, 148; Brown *v.* Rice, 26 Gratt., (Va.), 467, 470; 1 Story's Eq. Jur., §§ 218, 251; Blakeman *v.* Blakeman, 39 Conn., 320.

Though such an instrument may be reformed for a mutual mistake of *fact*: Neff *v.* Rains, 33 Wisc., 689; Boyd *v.* Dela Montagnie, 4 Thomp. & Cooke, 152; Brown *v.* Rice, 26 Gratt. (Va.), 467.

Where the boundaries of lands are pointed out by the vendor to the purchaser, but in the written contract of sale, and in the deed executed in pursuance of it, the description is made, by mistake, to include land not within such boundaries, the deed will be corrected, on the application of the vendor, so as to correspond with the boundaries thus pointed out: Johnson *v.* Taber, 10 N. Y., 319; Clark *v.* Baird, 9 N. Y., 183; Bush *v.* Hicks, 60 N. Y., 298; Bartlett *v.* Judd, 21 N. Y., 200, 23 Barb., 262; Hoppough *v.* Struble, 60 N. Y., 430, modifying 2 Thompson & Cooke, 664; Kostenbader *v.* Peters, 80 Penn. St. Rep., 438; see Id., 430; White v. Haight, 11 Grant's (U. C.) Chy., 420; Lundy *v.* McKamis, Id., 578; Grace *v.* McDermott, 13 id., 247;

Gillespie *v.* Grover, 3 id., 558; Russell *v.* Davy, 6 id., 165; Forrester *v.* Campbell, 17 id., 379; McDonald *v.* Ferguson, 17 id., 652; Merchants' Bank v. Morrison, 18 id., 382, 19 id., 1; Blakeman *v.* Blakeman, 39 Conn., 320.

See also Crawford *v.* Edwards, 33 Mich., 354; Ogilvie *v.* Squair, 10 Grant's (U. C.) Chy., 444; Hubbell *v.* McCulloch, 47 Barb., 302; Cottingham *v.* Boulton, 6 Grant's (U. C.) Chy., 186.

Though, in such case, the party seeking relief must not insist upon strict technical rules. He is not entitled to the benefit of the correction of a mistake, without allowing to the other party a similar benefit if there be also a mistake to his disadvantage: Hoppough *v.* Struble, 60 N. Y., 430, modifying 2 Thompson & Cooke, 664.

It is no answer to such application that the description in the contract and deed was made in accordance with the instructions of the vendor, where it appears that both he and the vendee believed the description to correspond with such boundaries: Johnson *v.* Taber, 10 N. Y., 319.

Nor that it was read to the party: Kostenbader *v.* Peters, 80 Penn. St. R., 438; see Id., 430.

The rule applies to a deed by a public officer: Houx *v.* County of Bates, 61 Mo., 391; Snyder *v.* Ives, 42 Iowa, 157; Bartlett *v.* Judd, 21 N. Y., 200.

But see Laub *v.* Buckmiller, 17 N. Y., 620.

Though such a mistake cannot be corrected as against a *bona fide* purchaser: Dart *v.* Barbour, 32 Mich. 267; Casler *v.* Sitts, 6 Hun, 659.

But the vendor may be compelled to account for the proceeds of the sale: Lundy *v.* McKamis, 11 Grant's (U. C.) Chy., 578.

And a grantee without value may be compelled to convey: Grace *v.* MacDermott, 13 Grant's (U. C.) Chy., 247.

So a mistake may be corrected as against lien creditors of the purchaser: Mauzy *v.* Sellars, 26 Gratt., 641.

A grantor verbally bargained certain land for a specified consideration, and, either by mistake or fraud, the premises conveyed did not include a parcel of ten acres embraced in the verbal agreement; whereupon, without rescinding the contract, the plaintiff brought assumpsit to recover the value of the lot thus omitted, or a proportional part of the consideration paid: Held, that the action would not lie. The plaintiff had her election to have the deed reformed in equity, if the omission was by mutual mistake; or to bring an action for deceit for damages, if the lot was fraudulently omitted; or seasonably to rescind the whole contract, and recover the entire consideration if fully paid; or could defend against the notes given for the purchase (if any were outstanding) by way of recoupment, to the extent of the injury sustained; but could not retain that portion of the land covered by the deed, and sue for the value of the portion omitted. The rescission must be total to maintain assumpsit, in which the whole consideration (if anything) would be recoverable: Rand *v.* Webber, 64 Maine, 191.

See Johnson *v.* Taber, 10 N. Y., 319; Clark *v.* Baird, 9 N. Y., 183; White *v.* Seaver, 25 Barb., 235; Hubbell *v.* McCulloch, 47 Barb., 302.

When money is recived in good faith, by mistake, it must be demanded before suit: Mayor *v.* Erben, 3 Abb. Ct. App. Dec., 255; Moak's Van Sant. Pl., 379, citing 1 Austin's Jur. (3d ed.), 488.

Plaintiff was teller of a bank, at which a note of defendant's became due. Defendant paid to plaintiff a sum of money which was afterwards discovered to be £25 short, and plaintiff was compelled to make good the deficiency to the bank: Held, that plaintiff could recover of defendant the amount paid by him, in an action for money paid for defendant's use: Rivers *v.* Roe, 4 Upper Can. Com. Pl., 21.

Plaintiffs having delivered a declaration against A. and B., and another against A. and C., with particulars of demand in each, A. and B. suffered judgment by default on the 16th of January, and paid the amount claimed in the particulars in that action. Afterwards A. and C. pleaded to the action. Plaintiffs, in the latter part of April, discovered that by mistake they had included in the particulars delivered to A. and C. items which ought to have been in the particulars delivered to A. and B. On affidavit of these facts, and that A. and B. were aware of the mistake, and allowed judgment to go by default on purpose, the court made absolute a

rule to set aside the judgment signed against A. and B., and amend the particulars of demand, on plaintiffs paying all costs and refunding the moneys received: Cannan *v.* Reynolds, 5 Ellis & Bl., 301, 85 Eng. C. L. Rep.

It has been held that judgment by mistake would not bar a recovery for the balance: Marvin *v.* Marvin, 52 How. Pr., 97.

See Snyder *v.* Ives, 42 Iowa, 157; Conklin *v.* Field, 37 How., 455.

To the contrary: Ewing *v.* McNairy, 20 Ohio St. R., 315; Moak's Van Sant. Pl., 378–9.

Negligence upon the part of one who, by mistake, pays to another a sum of money, to which the latter is not entitled, does not defeat the right of action of the former to recover back the money so paid: Lawrence *v.* American, etc., 54 N. Y., 432; Brown *v.* College, etc., 56 Ind., 110; Kingston Bank *v.* Eltinge, 40 N. Y., 391, affirmed on second appeal, 66 N. Y., 625; Union, etc., *v.* Sixth, etc., 1 Lans., 13, affirmed 43 N. Y., 452; Moak's Van Sant. Pl., 378.

Defendant's land having been taken for a local improvement, and an award in his favor for compensation having been made, the municipal corporation, with knowledge of the facts, paid him a sum larger than the award, and he received it in ignorance of the fact, he being informed by their clerk that it was the amount of the award, and relying on this information. There was some evidence that the amount actually paid was no more than should have been awarded; and there was no finding by the referee of mistake on the part of the corporation in making the payment. Held, that upon this state of the case, the corporation could not recover back the excess.

It seems, that in an action to recover back a sum overpaid in satisfaction of an award, it is competent to show, in defense, that the discrepancy was due to a clerical error in writing the award: Mayor *v.* Erben, 3 Abb. Ct. App. Dec., 255, affirming 10 Bosw., 189.

See Eisenmeyer *v.* Sauter, 77 Ills., 515.

The plaintiffs had for several years appealed from the assessment of their property, to the Court of Revision, which had decided against them, and from thence to the county judge, who had reduced it about one-third, on the ground that a large portion of their building was occupied by the courts. In 1864, the same assessment being repeated, they appealed to the Court of Revision, which said they would consult the city solicitor, and that the plaintiffs need not appear again. The plaintiffs' solicitor was told by the clerk of the Court of Revision that no judgment had been given, and found none in the book where their decisions were entered. The collector in October called upon the plaintiffs' secretary, who supposing all was right paid the sum assessed. The mistake having been discovered in the following year, held that plaintiffs might recover back the money paid, for the Court of Revision not having determined the appeal, the roll, as regarded the plaintiffs, was not "finally passed" within sec. 61 of the assessment act, so as to bind them.

A person seeking to recover money paid under a mistake of fact is not now bound to show that he has been guilty of no laches; the only limitation is that he must not waive all inquiry: Law Society *v.* Toronto, 25 Upper Can. Q. B., 199.

Money paid when the fact is known that the grantor is a married woman and her covenants are void cannot be recovered back, each party having equal means of information as to the real fact: Botsford *v.* Wilson, 75 Ills., 182.

[3 Chancery Division, 374.]

C.A., July 24, 1876.

374] *WADE-GERY v. HANDLEY.

[1870 W. 59.]

Will—Executory Limitation—Destination of Rents till happening of Event.

A testator devised estates to trustees and their heirs upon trust to accumulate the rents until the expiration of the term of twenty-one years, and after the expiration thereof to stand possessed of the estates in trust for the second and every other younger son successively of his nephew W. in tail male, and failing such issue, in trust for the first and every other son of his nephew H. in tail male, with divers limitations over; and he gave a fund of personal estate to be held on similar trusts. At the expiration of the term W. and H. were both living, and each had an only son:

Held (affirming the decision of Bacon, V.C.), that until it should be ascertained whether there would be a second son of W., the rents of the real estates and the income of the personal estate were undisposed of and belonged respectively to the heir-at-law and next of kin.

Sidney v. *Wilmer* (1) not followed.

THIS was an appeal by the plaintiff from a decision of Vice-Chancellor Bacon (2).

Yate Lee, for the appellant: We rely on *Sidney* v. *Wilmer*, which conflicts with *Hodgson* v. *Earl of Bective* (3). The Vice-Chancellor approved of *Sidney* v. *Wilmer*, and would have followed it had he not supposed that the decision of Vice-Chancellor Wood had been affirmed by the House of Lords.

It was so on other points, but on this point there was no appeal. The case, therefore, rests on the authority of Lord Westbury against that of Lord Hatherley when Vice-Chancellor, and the Vice-Chancellor in the present case expressed his opinion that the former decision was preferable.

Hemming, Q.C., and *Maidlow*, for the representatives of the heir-at-law and next of kin: This point was only a minor point in *Sidney* v. *Wilmer*.

[JAMES, L.J.: I do not see how to distinguish this case from that.]

375] *It is equally difficult to distinguish it from *Hodgson* v. *Earl of Bective* (3), and that case must be taken as overruling *Sidney* v. *Wilmer* (1). The point was not taken by counsel in *Sidney* v. *Wilmer*, being, no doubt, considered by them to be untenable. Such a thing was never heard of as that, where there are executory limitations to one class of issue, and in default of such issue executory limitations

(1) 4 D. J. & S., 84. (2) 1 Ch. D., 653, where the facts will be found fully stated.
(3) 1 H. & M., 376.

to another class of issue, the second should be held to take a vested interest liable to be divested on the first class coming into *esse*. The subject was considered in *Holmes* v. *Prescott* (1).

[*Re Mowlem* (2) was also referred to.]

MELLISH, L.J.: The alterations made by the House of Lords in the decree in *Countess of Bective* v. *Hodgson* (3) are an affirmance of the principle of the Vice-Chancellor's decision as to the rents.

Yate Lee, in reply.

JAMES, L.J.: The decision of Lord Westbury is so different from all the other authorities, that it cannot warrant us in going against the law so clearly settled by *Hodgson* v. *Earl of Bective*.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *A. F. & R. W. Tweedie; J. E. Fox & Co.*

(1) 12 W. R., 636. (2) Law Rep., 18 Eq., 9. (3) 10 H. L. C., 656, 671.

[3 Chancery Division, 384.]

C.A., July 28, 1876.

*In re EUROPEAN ASSURANCE SOCIETY. [384

DOWSE'S CASE.

Insurance Company—Dissolution—Transfer of Liabilities—Notice of Contents of Deed of Settlement.

By the deed of settlement of the R. N. Society, it was provided that the funds and property of the society should alone be answerable for claims on the society, and there were provisions enabling the society to make over its business to another company. The society granted an annuity to D. by a deed executed by three directors, which declared that the stocks and funds of the society should during the life of D. be liable to pay the annuity. Some years after this the R. N. Society made over its business to the E. Society in *manner authorized by the deed of settlement, [385 Both societies being under winding-up, D. claimed against the R. N. Society:

Held, that the omission in the annuity deed of any express reference to the deed of settlement did not distinguish the case from *Hort's Case* (1), and that D. could only claim against the E. Society.

THIS was an appeal from a decision of the arbitrator under the European Assurance Society Arbitration Acts, that Miss Dowse was not entitled to prove against the Royal Naval, Military and East India Company Life Assurance Society.

The material clauses of the deed of settlement, dated the 1st of January, 1839, of the Royal Naval and Military Society, are stated in the report of *Hort's Case* (1).

On the 11th of April, 1850, the society having agreed to grant Miss Dowse a life annuity of £10, a policy signed and

(1) 1 Ch. D., 307; 15 Eng. R., 762.

sealed by three of the directors was issued to her, which (omitting some clauses not material for the present purpose) was as follows:

"To all to whom these presents shall come, we the undersigned, being three of the directors of the Royal Naval, Military and E. I. Co. Life Assurance Society, send greeting: Whereas we have, on behalf of the society, contracted to sell to Frances Dowse, of, &c., one annuity or clear yearly sum of £10 during the life of Frances Dowse for the sum of £113 17*s*.: And whereas the said F. Dowse hath paid at the office of the said society the sum of £113 17*s*., in notes of the Government and Company of the Bank of England, and in cash, for the purchase of the said annuity: Now these presents witness that, in consideration of the said sum of £113 17*s*. so paid by the said F. Dowse at the office of the said society, as hereinbefore mentioned, the stocks and funds of the said society shall from time to time during the life of the said F. Dowse be subject and liable to pay to the said F. Dowse, or her assigns, at the office of the said society for the time being, one annuity or clear yearly sum of £10, by two equal half-yearly instalments, on the, &c., without any deduction or abatement: Provided always that the directors executing this policy shall not be responsible to any greater extent than the funds and property of the society in their hands or power at the time of any claim being made under this policy shall be
386] competent to discharge, and that no proprietor *shall in any event be liable beyond the amount of the unpaid proportion of his share or shares in the subscribed capital of the society. In witness," &c.

In 1866 the business of the Royal Naval Society was made over to the European Assurance Society in manner stated in the report above referred to.

Both associations being now in course of winding up, Miss Dowse claimed to prove against the Royal Naval Society, and her claim having been dissallowed by the arbitrator, the present appeal was brought.

Hemming, Q.C., *Cookson*, Q.C., and *Grosvenor Woods*, for the appellant: Our case is distinguished from *Hort's Case* (1) by the material fact that our contract contains no reference to the deed of settlement. We, therefore, are not subject to be handed over to another company, as we never contracted to that effect.

[MELLISH, L.J.: Was not the effect of our decision in *Hort's Case* this, that as soon as the amalgamation has

(1) 1 Ch. D., 307; 15 Eng. R., 762.

taken place the capital of the old company is no longer capital that can be called up, so that there cannot be any fund applicable to the discharge of the claim?]

That reasoning would apply if I were now asking for a winding-up order. But the order exists, and must be treated as valid until it is discharged. That was so held in the *Arthur Average Case* (1).

We have capital in this case. There is a liquidator with assets in his hands.

[JAMES, L.J.: How do you distinguish this from *Hort's Case*? The directors, by your contract, say on behalf of the society that the funds of the society shall be answerable. Does not that refer you to the deed of settlement as much as if it was in terms referred to?]

Hort's Case appears to turn on the expression that the funds of the society should be answerable "according and subject to the provisions of the deed of settlement." It was expressly by force *of those words that Hort was [387 held to have given the society by contract the right to transfer their assets and liabilities. *Greenwood's Case* (2) is against incorporating clauses that are not referred to.

Higgins, Q.C., and *Romer*, for the liquidators, were not called upon.

JAMES, L.J.: It is impossible to distinguish this case from *Hort's Case* (3). That case was very fully considered, and the legal position of the parties was explained. It was there settled that there could be no claim against assets which under the deed of settlement had been transferred to another company. The question is whether the omission from the present policy of the words "according and subject to the provisions of the deed of settlement of the said society," which occurred in Hort's policy, can make any difference between that case and this. In each case the directors, *quâ* directors, contract that the funds of the society shall be liable, and that must mean shall, according to the deed of settlement, be liable; the omission of those words being, in my opinion, wholly immaterial.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *Mercer & Mercer; J. V. Musgrave.*

(1) Law Rep., 10 Ch., 542; *post*, 522. (2) 3 D. M. & G., 459. (3) 1 Ch. D., 307.

[3 Chancery Division, 391.]

C.A., July 28, 31, 1876.

391] *In re* EUROPEAN ASSURANCE SOCIETY.

MILLER'S CASE.

Novation—Policy—Indorsement.

M. effected a policy upon his life with the B. N. Association. The B. N. Association subsequently was amalgamated with the E. Society, and ceased to carry on business. Some time afterwards a memorandum under the seal of the E. Society, and signed by two of its directors, was indorsed on the policy, declaring that the funds of the E. Society should be liable for the payment of the policy money, provided the future premiums were paid to the E. Society. The subsequent premiums were accordingly paid to the E. Society:

Held, that there was a complete novation, and that on the winding-up of the two companies, M. had no right of proof against the B. N. Association.

THIS was an appeal by Robert Miller from a decision of the arbitrator under the European Society Arbitration Acts, that he was not entitled to prove as a creditor in the liquidation of the British Nation Life Assurance Association, hereinafter referred to as "The British Nation."

The British Nation was constituted as a life assurance company under a deed of settlement dated the 28th of February, 1855, and was registered under 7 & 8 Vict. c. 110.

On the 17th of March, 1856, Miller effected a policy, No. 115, on his life, with the British Nation for £200, without participation in profits.

In 1865, negotiations took place for the amalgamation of the British Nation with the European Assurance Society, and on the 16th of March, 1865, a deed was executed by which the two companies agreed—

"That on, from, and after the execution of these presents, the association and the society are and shall be and become united, amalgamated, and consolidated as one association, society, or company, under the name or style of the European Assurance Society, until such name or style shall be changed by the authority of Parliament."

The policy holders in the British Nation were not in any 392] way *consulted in regard to the amalgamation, nor was any circular or notice stating the fact of the amalgamation, when effected, sent to them.

Under the terms of the amalgamation, the shareholders in the British Nation became entitled to shares in the European Society, and upon the amalgamation being completed, the British Nation ceased to carry on business.

On or about the 7th of February, 1867, the following indorsement was made on Miller's policy:

"The European Assurance Society.

"Chief Office, 316 Regent Street, London.

"Memorandum.

"It is hereby declared, that subject to the proviso hereunder stated, the funds and property of the European Assurance Society of London, as provided for in the deed of settlement of the said society, shall be liable for the due payment of the sum of £200 (without profits), assured by the within policy with the British Nation Life Assurance Association of London, to the person or persons legally entitled to receive the same. Provided always, that the future premiums payable in respect of the said policy be duly paid to the said European Assurance Society at the times and in the manner set forth in the said policy. In witness," &c.

This indorsement was sealed with the common seal of the European Society, and signed by two of the directors of that society. It did not appear under what circumstances it was indorsed; but as the policy was now in Miller's possession, the court considered that it was to be inferred that he had assented to the indorsement being made.

The receipts afterwards given for premiums were headed "European Assurance Society," and contained no reference whatever to the British Nation.

On the 12th of January, 1872, an order was made for winding up the European Society. The British Nation went into voluntary liquidation by an extraordinary resolution passed on the 18th of January, 1872, and the liquidation was, by order dated the 20th of January, 1872, continued under the supervision of the court.

The arbitrator having decided that Miller had only a right of *proof against the European Society, and not [393 against the British Nation, Miller appealed.

Cookson, Q.C., and *Millar*, for the appellant.

Higgins, Q.C., and *Romer*, for the liquidators, were not called upon.

JAMES, L.J.: This indorsement, in my opinion, constitutes a complete novation. The European Society say to the policy holder, "We will be liable on your policy if you will pay the premiums to us," and the policy holder agrees to this.

MELLISH, L.J.: The contract is, that in consideration of Miller's paying his premiums to the European Society instead of to the British Nation, the European Society will

pay the policy money. Then the non-payment of the premiums to the British Nation discharges the British Nation.

BAGGALLAY, J.A., concurred.

Solicitors: *Miller & Wiggins; Mercer & Mercer.*

[3 Chancery Division, 393.]

M.R., March 23: C.A., Aug. 4, 1876.

CUNLIFFE v. BRANCKER.

[1876 C. 37.]

Will—Contingent Remainder—Estate of Trustees.

A testator devised a moiety of his real estate to A. and B. and their heirs, to the uses and upon and for the trusts and purposes thereinafter mentioned, namely, to the use of A. and B., their executors, administrators, and assigns, for 120 years, if S. C., the wife of J. C., should so long live, and subject thereto, to the use of J. C. for life, with remainder to A. and B. and their heirs during his life, upon trust to preserve contingent remainders, with remainder to the use of all the children of J. C. and S. C. who should be living at the decease of the survivor of them, and the issue then living of such of the children as should be then dead, and the respective heirs
394] and assigns of such children *and issue as tenants in common (the issue taking only their parent's share), with divers remainders over. The will contained a power authorizing A. and B. and the survivor of them, and the heirs and assigns of such survivor, to "convey in exchange" any parts of the property, and to "convey upon partition" any of testator's undivided shares, with a direction that for those purposes it should be lawful for them by deed to revoke the uses, estates, trusts, and limitations of the property in shares so exchanged or conveyed in partition, and by the same or any other deed to "grant and convey" them to the requisite uses, "or for the purposes aforesaid to limit, appoint, or declare such use or uses," &c., as should be necessary. J. C. died in the lifetime of S. C.:

Held (affirming the decision of the Master of the Rolls), that the intention of the testator clearly was to create a succession of legal limitations in settlement, and that the court could not hold the legal fee to be in A. and B. merely because if it was not in them the contingent remainder to the children had in the events which had happened failed for want of an estate of freehold to support it.

EDMUND LEIGH, by will, dated the 6th day of December, 1814, directed all his just debts, funeral expenses, and the charges of the probate of his will, and the legacy thereinafter bequeathed, to be paid out of his personal estate if the same should be sufficient for that purpose, but if not, then he charged his real estate with the payment of the deficiency; and the testator bequeathed to his servant Jane Heaton a legacy of £300, which, however, he revoked by a codicil. The testator then devised one undivided moiety of all and every his messuages, lands, tenements, rents, hereditaments, and real estate whatsoever and wheresoever, in precisely the same terms in which he afterwards disposed of the second moiety, except that the names of Mary Ann Grundy and her husband Edmund Grundy were substituted for those of Sarah Cunliffe and her husband John Cunliffe,

and *vice versa*. The testator then devised the other undivided moiety of and in all and every his said messuages, lands, tenements, rents, hereditaments, and real estate unto the said Richard Prescott and Thomas Addison, their heirs and assigns, to the several uses and upon the several trusts and to and for the several ends, intents, and purposes, and subject to the several provisos thereinafter declared and contained of and concerning the same (that was to say), to the use of the said Richard Prescott and Thomas Addison, their executors, administrators, and assigns, for the term of 120 years next after his decease, if the testator's niece, Sarah Cunliffe, should so long *live, but, nevertheless, upon [395 the several trusts thereinafter mentioned of and concerning the same; and from and after the expiration or other sooner determination of the said term, and in the meantime subject thereto and to the trusts thereof, to the use of the said John Cunliffe during his life without impeachment of waste, with remainder to the use of the said Richard Prescott and Thomas Addison and their heirs during the life of the said John Cunliffe, upon trust to preserve the contingent uses and estates thereinafter limited from being defeated or destroyed, and from and immediately after the decease of the said John Cunliffe to the use of all and every or such one or more of the child or children of the said Sarah Cunliffe lawfully to be begotten who should be living at her decease, as they the said John Cunliffe and Sarah his wife during their joint lives by any deed or instrument in writing with or without power of revocation to be by them executed in manner therein mentioned, should from time to time appoint, and in default of such joint appointment, then as the survivor of them the said John Cunliffe and Sarah his wife should by any deed or instrument in writing with or without power of revocation to be executed in manner therein mentioned, or by his or her last will or codicil, appoint, give, or devise the same, and in default of such appointment, gift, or devise by the said John Cunliffe and Sarah his wife, or the survivor of them, to the use of all and every the child and children of the said Sarah Cunliffe lawfully to be begotten who should be living at the decease of the survivor of them the said John Cunliffe and Sarah his wife, and the issue of such of them as should be then dead leaving lawful issue then living, such issue respectively to have and take, and if more than one, equally amongst them, the part or share only which his, her, or their parent or parents respectively would have taken and been entitled to if living at the decease of the survivor of them the said John Cunliffe

and Sarah his wife, and the several and respective heirs and assigns of such child, children, and issue forever as tenants in common, and in case there should not be any child, or the issue of any child of the testator's said niece Sarah Cunliffe living at the decease of the survivor of them the said John Cunliffe and Sarah his wife, then to the use of the said Richard Prescott and Thomas Addison, their executors, 396] administrators, *and assigns, for the term of 130 years, to commence from the day of the decease of the survivor of them the said John Cunliffe and Sarah his wife, if the said Mary Ann Grundy should so long live, upon the trusts thereinafter mentioned concerning the same; and from and after the expiration or other sooner determination of the said term of 120 years, and in the meantime subject thereto and to the trusts thereof to the use of the said Edmund Grundy and his assigns during his life without impeachment of waste, with remainder to the use of the said Richard Prescott and Thomas Addison, and their heirs, during the life of the said Edmund Grundy, upon trust to preserve the contingent uses and estates thereinafter limited from being defeated or destroyed; and from and after the decease of the said Edmund Grundy to the use of all and every or such one or more of the child and children of the said Mary Ann Grundy, the wife of the said Edmund Grundy, who should be living at her decease, as they the said Edmund Grundy and Mary Ann his wife during their joint lives, by any deed or instrument in writing with or without power of revocation to be by them executed in manner therein mentioned, should appoint, and in default of such appointment, as the survivor of them the said Edmund Grundy and Mary Ann his wife should by any deed or instrument in writing with or without power of revocation to be executed in manner therein mentioned, or by will or codicil appoint, give, or devise the same; and in default of any appointment, gift, or devise by the said Edmund Grundy and Mary Ann his wife, or the survivor of them, to the use of all and every the child and children of the testator's said niece Mary Ann Grundy as should be living at the decease of the survivor of her and the said Edmund Grundy, and the issue of such of them as should be then dead leaving lawful issue then living, such issue respectively to have and take, and if more than one equally amongst them, the part or share only which his, her, or their parent or respective parents would have taken and been entitled to if living at the decease of the survivor of them the said Edmund Grundy and Mary Ann his wife, and the several and respective heirs and as-

signs of such child, children, and issue forever as tenants in common; and in case there should not be any child or children, or the issue of any child or children of either of the testator's said nieces Mary Ann Grundy and Sarah Cunliffe *living at the decease of the survivor of them [397 the said Edmund Grundy, Mary Ann his wife, John Cunliffe, and Sarah his wife, then the testator gave and devised all and singular his messuages, lands, tenements, rents, hereditaments, and real estate, unto and to the use of his kinsman James Topping, his heirs and assigns forever; and the testator declared that the term of 120 years thereinbefore limited to the said Richard Prescott and Thomas Addison, their executors, administrators, and assigns, was so limited to them upon trust during the said term to pay the clear yearly rents and profits of the premises therein comprised unto the testator's niece Sarah Cunliffe and her assigns for her separate use; and that the term of 120 years, if his said niece Mary Ann Grundy should so long live, thereinbefore limited to the said Richard Prescott and Thomas Addison, their executors, administrators, and assigns, was so limited to them upon trust during the said term to pay the clear yearly rents, issues, and profits of the premises therein comprised unto the testator's said niece Mary Ann Grundy and her assigns for her separate use.

The will contained a clause authorizing the trustees and the survivor of them, and the heirs and assigns of such survivor, to "convey in exchange" for other hereditaments all or any parts of the devised property "and the inheritance thereof in fee simple, and also in like manner to convey in fee simple upon partition" any of his undivided shares in property, and for those purposes he declared that it should be lawful for his trustees and the survivor of them, and the heirs and assigns of such survivor, by deed "to revoke, determine, and make void all and every the uses, estates, trusts, and limitations hereinbefore limited, created, expressed, and contained of and concerning the hereditaments so to be exchanged or conveyed on partition," and by the same or any other deed, "to grant and convey the hereditaments and premises, the uses whereof shall be so revoked" to such person and to such uses as should be necessary, "or for the purposes aforesaid, to limit, appoint, or declare such use or uses, estate or estates, trust or trusts, of and concerning the same hereditaments and premises as shall be necessary or expedient." There was a proviso that all such exchanges and partition should be made with the consent, in writing, of the person or persons for the time being en-

398] titled to the *rents and profits of the hereditaments to be conveyed in exchange or on partition, notwithstanding the coverture of any of them; and when any should be under the age of twenty-one years, then with the like consent of his, her, or their guardian or guardians.

There followed a clause that it should be lawful for the trustees, or the survivor of them, or the heirs or assigns of such survivor, with such consent as thereinbefore mentioned, "to demise or lease" all or any parts of the demised property for any term not exceeding seven years, at such rent or rents as they or he should think proper, without fine or premium, "such rent or rents to go along with and be incident to the immediate reversion of the premises so to be demised or leased." There were similar powers of granting mining and building leases.

It was further declared that it should be lawful for the trustees and the survivor of them, and the heirs and assigns of such survivor, when and as they or he should think fit, with such consent and approbation as thereinbefore mentioned, to fell timber and apply the proceeds as therein mentioned.

The testator died in June, 1817, leaving his two nieces his co-heiresses-at-law.

Mary Ann Grundy died in 1848, and her husband, Edmund Grundy, in 1855, and no question arose as to the moiety devised to the Grundy family.

John Cunliffe died in 1871, leaving his wife, Sarah Cunliffe, surviving. She died on the 9th of September, 1873, leaving several children; and the question then arose whether there was not an intestacy as to her moiety of the estates, on the ground that the limitation to her children living at her death was a contingent remainder, which, after the death of John Cunliffe, had no particular estate of freehold to support it. This action was brought by her children to have the question decided. No arrangement between the parties interested was possible, as the interest of Mrs. Grundy under an intestacy was vested in trustees upon trusts under which persons yet unborn might become entitled.

The case came on for hearing before the Master of the Rolls on the 23d of March, 1876.

Cotton, Q.C., and *Finch*, for the plaintiffs.

399] *Joshua Williams*, Q.C., and *North*, for the defendants, were not called upon.

JESSEL, M.R.: Well, Mr. Williams, I am sorry to say I shall not call upon you. I would cetainly if I could. This

is a case in which, according to my view, the intention of the testator fails on account of a feudal rule of law which, in my humble judgment, ought to have been abolished long ago. I mean the rule of law requiring that, in order to support a contingent remainder, there must be an estate of freehold in existence at the time the contingent remainder becomes vested, so that if until the time of the determination or cesser of the prior estates of freehold the remainder has not vested, it fails in spite of the intention of the settlor or testator. This has nothing to do with the intention. It always disappoints the intention, because every settlor, or testator, intends the contingent remainder to take effect. This is an arbitrary feudal rule, one of the legacies of the Middle Ages which has come down to our times, and which, not having been interfered with by the Legislature, I cannot interfere with. All I have to do is to construe the instrument fairly, find out what it means, and then to apply the established rules of law to the instrument, and see what the effect will be. I am sorry to say—for it disappoints in this case the intention of the testator—that I cannot bring myself to doubt what the meaning of this will is. The only point in contest is whether the legal fee in an undivided moiety of freehold land is or is not vested in certain trustees. Now, apart from the rule of law about the failure of contingent remainders, I think I may venture to say that no human being who understood anything about real property law would entertain a doubt about the meaning of this will. How far judges may be, or ought to be, able to defeat a rule of law of which they disapprove, I cannot say. I think it is the duty of a judge not to allow himself to be so influenced, but to construe the instrument in a proper way, to arrive at its meaning independently of the results, and then apply the law. This has been laid down over and over again with regard to another rule of law—the rule against remoteness or perpetuity—but I do not see that, because *in the opinion of the judge the one rule of law is [400 reasonable and the other unreasonable, the rules of construction are to be altered. Here is a gift of an undivided moiety of freehold land to Prescott and Addison, their heirs and assigns, to the several uses and upon the several trusts, &c., thereinafter declared, that is to say, &c. That form of gift shows that the testator intended *bona fide* a gift to uses, not that the Statute of Uses applies to wills, as we know; but it is an indication of intention that the legal estate is not to pass under the first gift, but to pass under the uses, otherwise all these uses will come to nothing—"to the use of the

same trustees, Prescott and Addison, their executors, administrators, and assigns, for the term of 120 years after my decease, if my niece Sarah Cunliffe shall so long live." Can there be a doubt, if it stood alone, that the legal estate of 120 years is vested in the trustees. The contrary construction would lead to this—that the term is of no use—the trustees would take nothing under the limitation of the term, as they had the fee already. This limitation would be simply absurd. Then it goes on, "But nevertheless upon the several trusts herein mentioned"—the trusts for the separate use of the lady—"and from and after the end, expiration, or other sooner determination of the said term of 120 years, and in the meantime subject thereto and to the trusts thereof, to the use of John Cunliffe and his assigns for and during the term of his natural life." Here, again, the word is "use," following the devise to them and their heirs, and of course it would give him the legal estate. It must be intended to do so. But it does not stop there, because the testator goes on, "and from and after the determination of that estate by any means in his lifetime to the use of the trustees and their heirs, for and during the natural life of John Cunliffe, upon trust to preserve contingent uses and estates hereinbefore limited from being defeated or destroyed." That is the common form, and shows clearly that John Cunliffe takes the legal estate; for you do not want a trust during his life to preserve contingent remainders, except to prevent the consequence of his forfeiture. That is plain, and though it is possible you may find a context so clear as to cut down even these words—for it is difficult to say what plain words may not be controlled—you certainly must find a context very plain indeed, and altogether inconsistent, to cut down 401] *such a plain limitation. To my mind, having some knowledge of the law of real property, the form of limitation to John Cunliffe, followed by the form of limitation to trustees to preserve contingent remainders during his life, shows clearly that John Cunliffe takes a legal estate for life. Then it goes on. "And from and immediately after the decease of the said John Cunliffe, to the use and behoof of all and every or such one or more of the child or children of Sarah Cunliffe lawfully to be begotten who shall be living at her decease." Now as to that, it is in such proportions, manner, and form, &c., as the survivors or the survivor shall appoint. What does that mean? No children are to take except children of Sarah who should be living at her decease, and the power only enables the donees to say which of the children then living shall take and in what shares.

If it stood there, would there be any doubt in the world that the children who survived Sarah Cunliffe, not being ascertainable till her death, take a contingent remainder? You cannot tell till her death what children will survive. It is quite true that the testator probably never heard of this rule of law, but I think his coveyancer did who drew the will, for it is a will drawn by a lawyer, and the conveyancer made a mistake, he overlooked the fact that if John Cunliffe died before his wife there would be no freehold to support the contingent remainders. The testator himself may never have heard of the law, and it is quite true he intended the children of Sarah Cunliffe who survived her to take. You do not want to take into consideration the effect of the power of appointment being given to the survivor, who may be Sarah Cunliffe, in order to make that intention plain. It was plain enough before. But it is said, inasmuch as Sarah may survive, and may make a will and appoint, it is impossible the will can take effect if I read it so. It is not impossible through any default or defect of expression of intention, but through the fault of the rule of law, and the argument is really used in this way: Inasmuch as the limitations the testator intended to take effect cannot take effect unless you give an estate in fee to the trustees so as to get rid of the rule of law, therefore you must infer an estate in fee to the trustees. How far is this to go? Are we to say that in every case where trustees are named for a different purpose, or *without any purpose at all, they are to [402 take the fee, if such a construction will preserve contingent remainders? Then, unluckily, in default of appointment the estate is given substantially in the same way to the use of all the children of Sarah Cunliffe who should be living at the decease of the survivor of the husband and wife and the children of such of them as should be then dead, which, of course, is also contingent till the death of the wife.

Then it was said there were some other portions of the will which would enable me to say that the trustees were intended to take the legal fee in spite of the words limiting their estate in the clear way I have referred to. I confess I should have been very glad if I could have brought my mind to that conclusion, because, construing the will as I feel bound to do, I certainly disappoint the intention. The first was a power to convey. "And I do hereby fully authorize and empower them or him at any time or times hereafter to convey in exchange." The word "convey" by itself does not show much; it is a word of general meaning, denoting any act by which real property is passed from one

person to another—a rather more modern term, I believe, than "assure," but having the same meaning. Then it goes on afterwards: "And for the intents and purposes aforesaid it shall and may be lawful for the trustees or trustee, by any deed or deeds, &c., to revoke, determine, and make void all and every the uses, &c., hereinbefore limited of the hereditaments so to be exchanged or conveyed in partition, or any part thereof." Nothing can be clearer. That is a power, and a power to exchange or partition under the Statute of Uses. It is to convey by way of revocation and appointment. On that, therefore, I think nothing available for the plaintiffs can fairly be argued. Then there is a proviso that all the exchanges and partitions under this power of exchange or partition "be made with the consent in writing of the person or persons for the time being entitled to the rents and profits of the hereditaments to be conveyed in exchange or on partition, notwithstanding the coverture of any of them. And when any shall be under the age of twenty-one years, then with the like consent of his, her, or their guardian or guardians." Then the next power is, "Provided always, and I declare my will and mind to be, that it shall and may be lawful for the trustees, &c., with 403] such consent as aforesaid, to demise or *lease all or any of my messuages, lands, tenements, &c., for any term of years not exceeding seven, to commence in possession, or at such other times as they shall think proper, so that there be reserved and made payable upon every such lease during the continuance thereof such yearly rent as they shall think reasonable, such rent and rents to go along with and incident to the immediate reversion of the premises so to be demised or leased." It is quite plain that it is a common power of leasing. There is no necessity in the world to give them anything else but a power. The next power is that it shall be lawful for the trustees with such consent and approbation as aforesaid to demise or lease all or any of the mines, quarries, and drifts of coal—a very large mining power; and there is afterwards a power of building. Again, the rents are to be incident to and go along with the reversion, and there are provisions for what should be contained in the leases. It appears to me it is a power, and nothing but a power. It is a power in words, it is a power in substance, and it is a power in intention. Then the next power is: "And I do hereby declare my will and mind to be that it shall be lawful for the trustees, &c., as they shall think fit, with such consent and approbation as aforesaid, to fell, cut down, sell, cart, and carry away such timber

and trees growing and to grow upon my said lands, &c., as they or he shall think fit, and to pay, apply, and dispose of the moneys to arise from the sale or sales of such timber and trees to such person or persons as shall then be entitled to the rents, issues, and profits of the land whereon the timber and trees so from time to time to be felled shall respectively be standing or growing, and in such parts, shares, and proportions as such person or persons shall be respectively entitled to such rents, issues, and profits." It is clear they do not want any estate for this. Then the last power is this: "And that each of them shall, by and out of the trust moneys or rents which shall come to his and their hands, retain to and reimburse himself and themselves, and pay and allow to his co-trustees all such costs, charges, and expenses as he or they shall or may pay, bear, sustain, or be put to about the execution of the trusts in this my will contained." That was said to show they had a fee, but I see no reason for it. It is a power to reimburse themselves out of trust-moneys that come to their hands. They get trust-moneys if they cut *timber or if they received the [404 rents under the term of 120 years during the life of the niece. They had, therefore, plenty of ways of getting trust-moneys without imputing an intention to the testator to give them a fee.

Under these circumstances, though I regret it, the testator's intention appears to be plainly to have been, not to vest in fee in the trustees, but to limit legal estates in settlement, and I am compelled by the artificial rule of law to say that I must disappoint his intention by stating that the contingent remainders fail for want of a sufficient estate to support them.

The plaintiffs appealed from this decision, and the appeal came on for hearing on the 14th of July, 1876.

Cotton, Q.C., and *Finch*, for the appellants: The question is, whether the trustees took the fee so as to preserve the contingent remainders. It has been laid down that the existence of contingent remainders, which, if the limitations are legal, are left unsupported, is a reason for holding trustees to take the fee: *Doe* v. *Willan* (1); *Houston* v. *Hughes* (2). The creation of the power here shows that the existence of contingent limitations expectant on the death of Sarah, if she survived her husband, was in the contemplation of the testator, but they could not take effect without an estate to preserve them. The cases of *Rackham* v.

(1) 2 B. & A., 84.

(2) 6 B. & C., 403, 419.

Siddall (1), *Blagrave* v. *Blagrave* (2), and *Doe* v. *Hicks* (3), support the contention that the fee is in the trustees. According to the view of the respondents, there was an intestacy in the event of the wife surviving the husband. There is, in the first instance, a gift to trustees sufficient to give them a fee, and the court will not, without express words, take it out of them, where the effect of so doing would be to defeat the testator's intention. The devise is to them "for the intents and purposes hereinafter declared." If they take the fee all the dispositions of the will can take
405] effect. Otherwise not. The power to grant *leases for any term of years is in favor of their having the fee: *Doe* v. *Willan* (4); *Watson* v. *Pearson* (5).

Joshua Williams, Q.C., and *North*, contrà: It is important that the landmarks of the law should not be removed for the purpose of obviating hardship in particular cases. *Doe* v. *Morgan* (6) is very like the present case as regards the form of limitation, and shows that this is a contingent remainder which will fail for want of a freehold to support it. It makes no difference whether a contingent remainder is created by way of devise, use, or otherwise: *Festing* v. *Allen* (7). This will is formally and regularly drawn as a will intended to operate under the Statute of Uses, and to confer legal estates on the successive takers. This was the intention, but there is a slip in framing the limitations. Had it not been for that slip it never would have entered the mind of any one to contend that the trustees took the fee. There is a wide difference between a case like this and those cited for the appellants, which were on informal wills. Here uses and trusts follow each other in a regular way, and the powers are such as would be given in a strict settlement will. The power of sale and exchange expressly authorizes the trustees to revoke the uses, which shows that they were not to effectuate the transaction by a conveyance of the legal estate which was in them. The language of the leasing power tends the same way. The rent is to be incident to the immediate reversion, showing that the lessor was not to take it. All the duties imposed on the trustees are given in the form of powers operating under the Statute of Uses. In *Barker* v. *Greenwood* (8) Parke, B., says that no case has been referred to where the preservation of contingent remainders has alone been held a sufficient reason

(1) 1 Mac. & G., 607.
(2) 4 Ex., 550.
(3) 7 T. R., 433.
(4) 2 B. & A., 84.
(5) 2 Ex., 581.
(6) 3 T. R., 763.
(7) 12 M. & W., 279.
(8) 4 M. & W., 421, 431.

for holding trustees to take the fee. Wms. Saund.(1) is to the same effect. The charge of debts will not give the trustees the fee: *Kenrick* v. *Lord William Beauclerk* (2). *Heardson* v. *Williamson* (3) is against the appellants. *Venables* v. **Morris* (4) is distinguishable, there being a [406 general trust for preserving contingent remainders: Jarman on Wills (5). The remark in *Houston* v. *Hughes* (6) was only an *obiter dictum*. The employment of the word "use" shows that the Statute of Uses was intended to operate: Co. Litt. (7); *Doe* v. *Willan* (8). The decision in *Festing* v. *Allen* (9) has been repeatedly followed. The last case is *Brackenbury* v. *Gibbons* (10). The Statute of Uses applies to wills: Sugden on Powers (11); therefore to show that the devisees to uses are more than conduit-pipes, you must show an intention that they are to have an estate. The court cannot, in order to effectuate a presumable intention not to be discovered in the will, adopt a construction which will prevent express limitations from taking effect: *Curtis* v. *Price* (12).

[MELLISH, L.J.: Surely it is to be discovered in the will that the testator intended the limitations to take effect if his wife survived.]

He no doubt, through mistake, thought they would take effect, *Doe* v. *Hicks* (13), which is cited against us, is an authority for us; it shows that a gift to trustees and their heirs will not give them a legal fee when there is no occasion for them to have it. Many of the powers in the will are made absurd if the fee is in the trustees, and the limitation of a term to them is utterly inconsistent with their having the fee: *Beaumont* v. *Marquis of Salisbury* (14); *Lewis* v. *Rees* (15); *Cooper* v. *Kynock* (16).

Cotton, in reply: Whether the limitations of a will are equitable limitations, or are operated upon by the Statute of Uses, is a question of intention appearing on the will: Jarman on Wills. The question then is, whether there is not apparent, on the face of this will, an intention which requires the legal estate to be in the trustees. *In [407 *Doe* v. *Morgan* (17) and *Brackenbury* v. *Gibbons* (16) there was no devise at all to trustees. The ultimate limitation

(1) Vol. ii, p. 11, b.
(2) 8 B. & P., 175.
(3) 1 Keen, 33.
(4) 7 T. R., 342, 438.
(5) 3d ed., vol. ii, p. 293.
(6) 6 B. & C., 419.
(7) Page 271 b, n.
(8) 2 B. & A., 84.
(9) 12 M. & W., 279.
(10) 2 Ch. D., 417.
(11) 8th ed., p. 146.
(12) 12 Ves., 89.
(13) 7 T. R., 433.
(14) 19 Beav., 198.
(15) 3 K. & J., 132, 148.
(16) Law Rep., 7 Ch., 898.
(17) 3 T. R., 763.

in this will is "unto and to the use," showing that it was intended to limit over the estate given to the trustees. *Festing* v. *Allen* (1) has never been treated as an authority on the quantity of estate taken by trustees. The only point considered was whether the remainders were contingent. The court will not ignore the devise to the trustees: Sugden on Powers (2).

Aug. 4. JAMES, L.J., after reading the material parts of the will, continued:

It cannot be doubted (and it has not even been argued otherwise) that the limitations, according to their ordinary natural construction, are legal limitations. And it would be impossible for us to make them equitable instead of legal limitations merely because in the events which have happened the contingent remainders are left without a sufficient freehold estate to support them. The rule of law was, and strange to say still is, that a contingent remainder fails unless there be a preceding freehold estate continuing to exist up to the happening of the contingency on which the remainder is to vest. Contingent remainders have been protected against the destruction of the preceding particular estate, but have been still left to die with the death of such estate through an inherent defect in their original constitution.

That is the rule of law, and we cannot help it. We cannot alter the construction of the instrument to avoid or evade that rule. We must construe the words just as if there were no such rule of law, and then, having thus ascertained the construction, apply the rules of law to the instrument so construed.

I have said that if the devise, the series of limitations I have read, stood alone, no lawyer could doubt that these limitations were limitations of legal estates, or would suppose that it was intended by the instrument that the trustees should have no term of years, should have no estate
408] *pur autre vie* to support the *contingent remainders, but should have the entire legal fee in them.

But it was contended, and truly, that, notwithstanding these apparently clear indications of intention that the successive beneficial devisees should have the legal estate in them, the rest of the will might still show so clearly a contrary intention that the fee should be in the trustees, that there were purposes to be effected, trusts to be executed, duties to be preformed so requiring them to have the fee, that we should reject the formal limitations as the mere

(1) 12 M. & W., 279. (2) 8th ed., p. 811, par. 79; p. 813, par. 82.

blundering of the draftsman, just as if they were, as they often are, found in the wills of testators who had themselves nothing but an equitable estate or a long term of years to deal with.

The indications of such intention are, it is said, to be found in the subsequent powers and provisions of the will. The material subsequent powers and provisions are those providing for sale and repurchase, for leasing and for cutting timber. The first, so far from showing any such intention, is, in truth, pregnant with evidence to the contrary. The sale is not to be made by a conveyance out of the legal fee in the trustees, but by revoking the old uses and limiting new uses to effect the sale in terms the same as the ordinary machinery of a similar settlement by deed. And the new estates to be purchased are to be taken by a conveyance to the existing uses, and a conveyance would naturally, and, as a matter of course, limit the estate to releasees to uses, transcribing the very words of the will from the power. The leasing power is the ordinary leasing power which is found generally in settlements and wills, and no more requires that there should be the fee in the donee of the power than the leasing power to a tenant for life enlarges his estate to a fee. The lease would take effect to all intents and purposes legally and equitably under the power, as a mere power, as fully as if it were derived from a fee simple in the persons leasing.

The power of cutting and selling timber, again, would not be in the slightest degree embarrassed or prejudiced by the want of an estate in the persons exercising it. Its legal operation would be just the same as that of a power to executors (not being devisees of the realty) to cut and sell timber in aid of the personal estate. *The power to [409 sell timber, which is part of the land, certainly no more requires a fee simple estate, or any other estate, than the power to sell the land with the timber on it, which power has already been dealt with. The truth is that these indications of an intention to leave the fee simple in the devisees to uses, are so slight, so shadowy, that no one would have dreamt of finding such intention in them if they had not been found in the same instrument with a blundering, inaccurate, and insufficient limitation to preserve the contingent remainders. But I repeat that we must construe these parts of the will as we were obliged to construe the limitations themselves, just as if the limitation to preserve had been ample and sufficient—just as if no such limitation were by the rules of law necessary.

Considerable stress was laid in the argument on two cases, *Doe* v. *Willan* (1) and *Houston* v. *Hughes* (2), in which Mr. Justice Bayley considered that the want of any estate to preserve the contingent limitations afforded an argument that the fee was intended to remain in the trustees. It is not necessary to inquire whether those *dicta* will bear examination, whether instead of making the legal consequences depend on the construction they are not making the construction depend on the legal consequences. Nobody intends that the contingent remainders devised by his will should fail, and it is by a rule of law, independent of and paramount to his intentions, that they do in the result fail. It is unnecessary to enter upon that inquiry, for it is impossible to apply those *dicta* to this case. In the absence of any contrary or inconsistent intention expressed in the instrument, it may be convenient to hold that if there are words sufficient to give the fee to the devisees in trust, the same shall be held to remain in them if there be any intention in the will which would be better served by its so remaining. But here the express limitation of the term of years and of the estate to preserve contingent remainders are absolutely inconsistent with an intention that the fee should remain in them, so that there should be no such term and no such estate ever to come into existence. It is said, indeed, that Lord Cottenham, in *Rackham* v. *Siddall* (3), held that a limitation of a term to trustees in the particular
410] *will before him did not prevent the trustees from having the legal estate in fee. But in that case the legal estate had been in the plainest words limited to them in fee, and he put it expressly on the ground that there were two plainly inconsistent devises, and he chose the first.

To apply that case, or the *dicta* of Mr. Justice Bayley, to the case before us, we should have to hold generally that wherever there is a devise to a man and his heirs to uses, and there is in the will a contingent remainder unprotected, the legal fee remains in him, making every limitation equitable in order to give protection to such remainder. We could not and would not so hold, if we thought the rules of law as to particular estates and contingent remainders reasonable and beneficial, and so long as the Legislature retains them we are bound to act as if they were most reasonable and beneficial. We could not so hold without expressly overruling the case of *Festing* v. *Allen* (4), in which the point was apparently thought unarguable by most of the

(1) 2 B. & A., 84.
(2) 6 B. & C., 420.
(3) 1 Mac. & G., 607.
(4) 12 M. & W., 279; 5 Hare, 573.

counsel engaged, in which it was argued by one counsel and was put aside as not worthy of serious consideration by the judges at common law and in equity; and the case of *Festing* v. *Allen* has been from the time it was pronounced regarded as one of the leading authorities in real property law.

We must affirm the judgment of the Master of the Rolls.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *Gregory, Rowcliffes & Rawle; W. W. Wynne.*

[3 Chancery Division, 411.]

V.C.M., July 14: C.A., Nov. 17, 1875.

**In re* REGENT'S CANAL IRONWORKS COMPANY. *Ex parte* GRISSELL. [41]

Debentures—Creditors—Vendor—Priority—Liquidator's Charges—Costs of Realization—Costs of Preservation—Leaseholds.

Under agreements made between a company and G., from whom the company had previously bought its works, G. was to advance money to the company, and all moneys due to the company were to be received by G., who was to apply these moneys and also the money to be advanced by him in paying wages and salaries and other outgoings for the business of the company, and subject thereto was to repay himself. An order was made for winding up the company, under which G. and the liquidators, with the sanction of the Vice-Chancellor, made an agreement for an advance by G. of further sums on similar terms. G. advanced money for the payment of rent, rates, wages, and outgoings: a large balance remained due to him. The leasehold property, machinery, and plant of the company were sold by the liquidators:

Held, varying the order of Malins, V.C., that the costs of carrying on the business were not payable out of the mortgaged property in priority to debentures as costs of preservation, and that (subject to the costs of realizing the property) the fund belonged to the debenture holders in priority to the claims of G. or the liquidators for the costs so incurred.

HENRY GRISSELL, previously to 1864, carried on the business of an iron manufacturer, and in that year a company was formed for the purchase of his business. The company was called the Regent's Canal Ironworks Company, Limited. The capital was to be £250,000 in £20 shares, and by the articles of association the directors might borrow any sum or sums of money on mortgage, or on bonds, debentures, or any other security whatsoever, at such rate of interest and upon such terms and with such provisions in favor of the lenders as the directors might think proper. Under an agreement dated the 4th of July, 1864, the company agreed to purchase the works, stock-in-trade, and good-will of the business for £70,000, partly in cash, partly in shares, of which all but £15,000 was paid.

At a meeting of the directors held on the 21st of March,

1865, it was resolved that mortgage debentures of the company to the extent of £25,000 should be issued, and accordingly debentures to the amount of £15,000 were issued to
412] six persons, and debentures *to the amount of £10,000 were issued to trustees for the company, and were afterwards by them assigned to the International Financial Society as security for money advanced. Each debenture was in the form of a deed-poll, by which the company declared itself bound to pay to the person therein named the sum of £250 and interest; and for the due payment thereof the company charged all the funds, property, and effects of what nature or kind soever which the company held or possessed, or should hold or be possessed of; and the company agreed to hold 1,250 unissued shares for further security.

By articles of agreement dated the 1st of June, 1866, and made between the company and Grissell, it was agreed that Grissell should advance for the use of the company £4,000 for a period of four calendar months, he deducting thereout £100 for interest. If the money was not repaid at the end of the four months it was to bear interest at £10 per cent. During the four months, unless Grissell should give the notice thereinafter mentioned, the business should be carried on under his direction. "All moneys due or to become due in respect of works executed by the company, whether already completed or now in progress, or new works to be undertaken by the company during the continuance of this security, shall be received by the said H. Grissell, his executors or administrators, and be paid to the credit of the manager's account with the company's bankers, and no one but the said H. Grissell, his executors or administrators, shall be entitled to draw on such account." The security was to be subject to the application of certain payments to meet certain acceptances, but subject thereto, Grissell was to apply the sums to be so received by him, and also the sums to be advanced by him as aforesaid, in taking up acceptances of the company and in paying the wages and salaries of the servants of the company, and in making such other payments as might from time to time become due from the company in carrying on the business. When all the moneys had been so paid, Grissell was, out of the moneys so to be received, to pay himself the sums advanced by him as aforesaid, and interest as aforesaid. The company might at any time, on payment to Grissell of what was due or secured to him, put an end to this agreement.

413] *Similar agreements, dated the 3d of July, 1866,

and the 5th of September, 1866, as to further advances, were made between the company and Grissell. Grissell made the advances, and there was a balance due to him on them. He had also acted as managing director.

On the 17th of December, 1866, the company resolved to wind up voluntarily, and on the 21st of December, 1866, the voluntary winding-up was directed to be continued under the supervision of the court.

On the 22d of December, 1866, Grissell and Mr. Judkins, one of the liquidators, were summoned to attend before the Vice-Chancellor Malins in Chambers, and by the direction of the judge, which was given for the purpose of obviating the serious loss and inconvenience which would result from the sudden and complete stoppage of the works, which was otherwise inevitable, an agreement was made between the company and Grissell, by which Grissell was requested to advance the money for payment of wages and other outgoings due that day. The works were to be kept open by Grissell, and continued so long as in the liquidators' discretion should appear desirable, it being understood that the workmen and the necessary outgoings up to the time of any stoppage of the works should be paid by funds to be provided by Grissell, in respect of which he should have the same security as for the advances made under the former agreements. He was also to make advances for the purchase of materials, with corresponding rights. He should be undisturbed in the collection of debts due to the company to an extent adequate to his complete reimbursement in respect of the above mentioned advances, he undertaking to pay all moneys collected by him to a separate acccount, and only to draw upon that account sufficiently for his reimbursement. The advances were to bear 5 per cent. interest.

In pursuance of this agreement Grissell found all the money (beyond the amounts from time to time received by him) to pay the wages and prevent the closing of the works; he also paid rent, taxes, insurance, and other outgoings, in default of payment of which the leases would be liable to forfeiture.

Several orders were made in the winding-up expressed to be without prejudice to the claims of Grissell or the debenture *holders; and on the 28th of January, 1871, an [414 order was made for an account, 1, of what was due to Grissell as unpaid vendor; 2, of the payments made by him for rent, rates and taxes. And it was ordered that the liquidators should sell and realize the assets of the company, and, after payment of the costs of all parties appearing, the

liquidators were out of the proceeds of such sales to pay to Grissell the amount found due to him as unpaid vendor, and the residue was to be paid into a bank; the order being without prejudice to the question whether anything was due to him on the second account, and how and in what priority, and without prejudice to the claims of the liquidators for costs and remuneration. This order was varied on appeal, and was made without prejudice to any claim of the liquidators in respect of costs or services rendered in or about the preservation or realization of the property included in the securities of the debenture holders of the company.

The property was accordingly sold, and out of it the balance of the purchase-money had been paid to Grissell.

The money now in dispute represented exclusively the proceeds of the sale of the leaseholds and machinery and plant (all of which were comprised in the security of the debenture holders), and no part had arisen from the proceeds of carrying on the business.

In order to ascertain the principles on which the accounts were to be taken, a statement was made and settled stating as above mentioned; also that the points of contention were: 1. Grissell claimed first any costs due to him as unpaid vendor or mortgagee, and then the sums expended by him in and about the protection and preservation of the company's property in priority to all other claims. 2. That he was entitled to receive and retain all moneys earned by the company before the 22d of December, 1866, in reduction of the amounts due to him under his several agreements, in priority to any claims except as to No. 1. 3. That he was entitled to receive the moneys earned by carrying on the business after the 22d of December, 1866, and to apply them in reduction of the amount due to him for money expended for the purpose of the said business. 4. That he was entitled to be paid out of the general assets of the company in priority to any other claims.

415] *The International Financial Society contended that Grissell was not entitled to be paid unless the proceeds of the sales should prove more than sufficient to satisfy the claims of the debenture holders. 2. That the liquidators were not entitled out of the funds in hand to any costs incurred or remuneration for services rendered in respect of the preservation of the property, or to any other costs than the expenses incurred in and about the realization of the property. 4. That as to sums expended by Grissell in and about the protection and preservation of the property, he must carry them and the other outgoings paid by him to

the debit side of his account and appropriate them in payment of the items on the credit side. 6. That Grissell was not entitled to any costs except those of an unpaid vendor.

The other debenture holders claimed a general priority, subject only to Grissell's charges as unpaid vendor.

The liquidators claimed a permanent lien upon all the assets of the company in respect of their remuneration for services, and for their costs, charges and expenses of and relating to the winding-up.

Upon this statement the questions were argued before the Vice-Chancellor Malins on the 14th of July, 1875.

The same counsel appeared for the different parties, and arguments were used similar to those used on the appeal.

MALINS, V.C., after stating the facts of the case, said that the contract of the 1st of June, 1866, certainly contained nothing unfair or unreasonable. The company was in difficulties; they wanted money, and nothing could be more fair or proper than that the person who advanced the money to enable them to complete their contracts should not stand by and allow the proceeds of those contracts to go into the general assets of the company, but should, in the first place, out of the proceeds of those contracts, be repaid all sums of money which he had advanced for their completion. That was the plain and distinct meaning of the contract. His honor then stated the proceedings in the liquidation: that there was a representation made to him that there were no means of paying the workmen; that one of the liquidators *and Grissell, at his honor's request, attended before [416 him, and it was then arranged that Grissell should advance the money in order that the men might be paid. It was for the advantage of all parties, whether debenture holders or ordinary creditors, that the works should be carried on, which could not be done without assistance. It was an arrangement of the court, and whatever was agreed to must be fulfilled with the utmost punctuality, because the honor of the court was involved in seeing that Grissell had all his rights under that contract. His honor must regard all the parties as before him on that occasion, although the debenture holders did not actually appear. Under the agreement the liquidators could at any time have stopped the works, and Grissell would be obliged to stop them. His honor then continued:

Confining my attention for the moment to the effect of the document of the 22d of December, what rights does it give Grissell? . My understanding undoubtedly is, that whatever money Grissell on and after that day advanced for the ben-

efit of the company, whether in the payment of wages, rent, taxes, or for materials, to get labor to complete the existing contracts for the benefit of the company, he was to be reimbursed, not only out of the money received from the contracts which he advanced money to complete, but out of all property of the company, whatever that might be. Was there in this any injustice or hardship to the debenture holders or any one else? If this had not been done the whole thing would have gone to rack and ruin. It is all very well to be wise after the event, but the opinion at that time was that it was for the interest of all to carry on the works. The latter end of 1866 was a period of great difficulty in all commercial concerns; the world was never in a greater state of confusion as to financial affairs than it was in the latter part of that year, and probably the speculation of all parties, the debenture holders included, was that if they could hold on for a time they might sell to some other company or to some advantage, and that it was better for all parties to have the money advanced and to go on and complete the contracts, instead of being made liable for breaches of contract. And although the order does not in terms give Gris-
417] sell a right to resort to *any other property (I think it rather defectively worded in that respect) than the receipts of the company, yet in my opinion the spirit and object of the order undoubtedly was an indemnity to him out of every part of the property. Therefore I am of opinion that all advances made by him under that order must be repaid out of every part of the property which can be found.

Entertaining that view under the order of the 22d of December, the next question is, What is the effect of the contract between Grissell and the company made on the 1st of June, 1866, with which the court had nothing to do? There, it appears to me, the company have deliberately agreed that Grissell should be reimbursed all moneys advanced by him up to £4,000 out of the proceeds of the contracts. There is no agreement there that the general property of the company shall be liable, and therefore I am unable to say that for the payment of the indemnity of this deed he can resort to anything more than is specifically mentioned in the contract, and I understand that it is not claimed. If money has been partly earned and materials supplied before the 22d of December, and that work has continued after, my opinion is that Mr. Grissell is entitled to receive the proceeds, and, in the first place, to apply those proceeds in repayment of all he has advanced under the order of the

court, and what remains after that he is entitled to apply in repayment of whatever he has advanced under the contract of the 1st of June.

After some discussion as to the form of the order, his honor proceeded to say: There is one other point, and that is as to the priority of the liquidators' claims for remuneration and expenses over Grissell's claim. No doubt under the 144th section of the act of 1862 a liquidator is to have priority for all his costs, charges and expenses. The words are very explicit, and have always been acted upon; but here one of the liquidators came before me, and virtually renounced that right, deliberately giving priority to Grissell. If he had intended to have priority, he should have reserved it. I must regard him as having renounced his strict rights, because in common with all others he thought it better to have the money provided for the works than suddenly to stop them. Therefore I cannot allow the claims of the liquidators or *of the debenture holders, or any claim [418 whatever, to stand in the way of Grissell's rights under this express order of the court, and any such rights ought to have been reserved in terms.

The order made was that Grissell was entitled to be paid any costs due to him as unpaid vendor or mortgagee in priority to all other claims. That under the agreements of the 1st of June, 1866, the 3d of July, 1866, and the 5th of September, 1866, Grissell was entitled to retain the moneys paid for work done wholly or in part by the company before the 22d day of December, 1866, whether received before or after that date, in reduction of the amounts due to him under the several agreements; and if the money paid for work not finished before the 22d of December, 1866, was insufficient to recoup the expenditure thereon, the amount was to be apportioned between the expenditure before and expenditure after the 22d of December, 1866. That, under agreement of the 22d of December, 1866, Grissell was entitled to a first charge on all the property of the company, including the proceeds of sale of the leasehold premises, for all moneys advanced by him, for whatever purpose, on the faith of that agreement, and for all moneys paid by him for rents, rates, taxes, premiums of insurance, or otherwise, in or about the protection and preservation of the company's leasehold premises, plant, machinery, stock, and effects, and interest thereon. That subject to the costs of Grissell as unpaid vendor the costs of Grissell and of the liquidators incurred in realizing any property of the company were to be paid out of the proceeds realized in priority to all other claims; with this

exception, that any claim of the liquidators for costs and otherwise was to be postponed to the claims of Grissell under the agreement of the 22d of December, 1866.

As against this order there were three appeals. The International Financial Society asked for priority over Grissell, and over the claims of the liquidators for costs and remuneration; the other debenture holders asked for priority over all claims except those of the Financial Society; and the liquidators asked for payment of their costs and remuneration in priority to Grissell's claims.

419] **J. Pearson*, Q.C., and *Davey*, Q.C., for the Financial Society: The agreement of the 22d of December, 1866, was not an order of the court, but a mere agreement; and even if it had been an order, it cannot be construed to bind the debenture holders who were not present. We are mortgagees, and are entitled to our security; and no creditor, however much he may have benefited the property, can come before us: *Holroyd* v. *Marshall* (1). There is no question here as to how the money arose.

Glasse, Q.C., and *C. T. Simpson*, for other debenture holders.

Higgins, Q.C., and *Hastings*, Q.C., for the liquidators.

Cotton, Q.C., and *Kekewich*, for Grissell: The payments made by Grissell are clearly in the nature of salvage, and must have priority. Some were for rents, rates, and taxes. Moreover, Grissell was an unpaid vendor with the legal estate, and has been acting not only under the order of the court, but as an unpaid vendor protecting his property. The liquidators, representing all parties, might at any time have stopped Grissell, but did not. As long as Grissell was left in the management of the business, he must have a right to be repaid what he advanced for the business.

JAMES, L.J.: On the main point of this case I am clearly of opinion that there has been some miscarriage on the part of the Vice-Chancellor, probably due to this, that he fancied that he had in some way, acting in the winding-up, induced Mr. Grissell, by sanctioning that agreement, to lay out money, and that he thought, therefore, as he himself expressed it in his judgment, that the honor of the court was in some way involved, and that it was for the honor of the court to see that Grissell was paid the moneys which he had been induced by the sanction of the court to lay out in carrying on the works.

But the honor of the court cannot be satisfied at the ex-

420] pense *of somebody else, who is not in point of law

(1) 10 H. L. C., 191.

or in point of equity bound to satisfy it out of his means. It really comes to the simple question of what was the right of the debenture holders. It appears that the machinery, plant, and effects (the proceeds of which are now in question) were well and effectually mortgaged to the debenture holders, and the debenture holders were, in my opinion, in exactly the same position as any other equitable mortgagees who had lent money to the company.

Then the company, finding themselves in difficulties, borrow money from Grissell, and desire him to carry on the business. The company finding themselves in greater difficulty, a supervision order is obtained from the court, which gives the court a great power of sanctioning and directing what is to be done. Then the Vice-Chancellor, upon somebody's motion—it does not appear clearly before us how—took upon himself to summon the liquidator and Grissell before him, and in the presence of the Vice-Chancellor an agreement is come to between Grissell and the liquidator on behalf of the company, which, being sanctioned by the court, effectually bound the company whose liquidator was there. But no debenture holder was summoned, no debenture holder was asked whether he did or did not approve of the arrangement, and in the absence of the debenture holders, whatever was the construction of that agreement, the debenture holders could not be affected by it.

It is said that the transaction was for the benefit of the debenture holders, and that if this property had been sold at that time, in all probability it would have sold badly, and therefore it was for their benefit that the works should be carried on. But, then, the debenture holders were the persons who had a right to express their opinion whether the business should be carried on at their risk. Of course as long as the company were minded to keep it on, the debenture holders might very reasonably be minded not to interfere with what their mortgagors and debtors were doing, because their security—the thing which constituted their security—was still remaining *in esse* to answer their demands. Therefore they had no occasion to apply their minds to the question whether it would be to their benefit or not that the works should be carried on. Their debtors, who acted with the sanction of *the court, thought it [421 was for their own benefit that it should be carried on, but that left the property still remaining liable to the charge.

In truth, however, there was no attempt to do what of course the court would not have done in the absence of the debenture holders—there was no attempt by that agreement

to interfere with the rights of any persons who were not before the court at that time. When the document is looked at, it is seen to be an agreement entirely within the competence of the parties to make with the sanction of the court, but it was within the competence of those parties, and within the jurisdiction of the court, because it expressly and guardedly abstained from affecting any interests of any person whatever who was not then before the court. The agreement simply enables Grissell to go on working, advancing his money for carrying on the works, and giving him a charge upon all the proceeds of all the things that were to be realized by carrying it on. He might have been disposed to run that risk, because he was at that time a very considerable mortgagee of the property in respect of his unpaid purchase-money, and he in that character might very well say, "This is not a year in which I should like to have the property sold; I would rather run the risk of carrying on the work and getting paid the moneys I advance, keeping the whole thing in my control." I believe Grissell was also largely interested as a holder of fully paid-up shares in the company, so that he had a deep interest which might have induced him to do it.

The agreement did not profess to bind, and it could not in point of law have bound, persons who were not before the court. I am of opinion, therefore, that on the main point the order of the Vice-Chancellor has improvidently emanated from him.

There are one or two minor points to be mentioned. First of all, it is suggested that what Grissell has paid for rent and taxes during that time was paid by way of salvage, because the lessor would have entered for a forfeiture if he had not paid these debts. It does not appear whether that would be so or not, but in truth these payments of rent and taxes were made as part of the current outgoings of the business when he was managing the business under those agree-
422] ments, and of course would be outgoings *to which the very first receipts from the business would be applicable. I am of opinion, therefore, that he paid those sums, not on behalf of the debenture holders, not for the purpose of securing the debenture holders anything, but merely as part and parcel of the management which he was carrying on under the agreement that he made. That being so, it appears to me that there is no claim which he can sustain against the mortgagees for payment of those sums.

Then another point is this: It is said, *non constat*, that some of the plant that was sold was not bought by him since

the agreement of December. That agreement certainly does not authorize the purchase of any plant: He had a right to purchase materials, to pay wages and carry on the working, and there is in fact no suggestion that anything like plant was really bought by him. If there was, the parties ought to have taken care to have prevented that passage appearing in the Chief Clerk's certificate that the whole fund in court was the proceeds of the leaseholds, plant and machinery.

I am of opinion, therefore, taking the statement as it stands, that the proceeds of the leaseholds of machinery and of plant belong to the debenture holders, and not to Grissell, subject of course to the costs of realization.

MELLISH, L.J.: I am of the same opinion. I think it is clear that the charge given in favor of the debenture holders upon the lease and the machinery and the plant could not possibly be affected by a subsequent agreement between the liquidator and Grissell, assented to by the Vice-Chancellor, even if the Vice-Chancellor was right in thinking it was an order of the court.

Then it was argued on behalf of Grissell, that in respect of the rent and the taxes and the rates which had been paid subsequently to the making of the agreement of December, 1866, he was entitled, because he was a vendor in possession, and under his agreement for purchase he, as vendor in possession, was entitled to pay all those charges, and have the same charge as he would have for his purchase-money, and that that would take precedence of the rights of the debenture holders, which are merely equitable *rights, [423 claiming under the company. In my opinion, besides the other answers which probably might be given to that argument, if the agreement of December, 1866, is looked at, it is perfectly plain that the rent and rates and taxes were paid under and by virtue of that agreement, and upon the terms that he should have the particular security given to him by that agreement for those payments, and that it is perfectly inconsistent with his being vendor in possession, having the rights which a vendor in possession would have under the original purchase deed. If Grissell intended to have the rights of a vendor in possession under the original purchase agreement, when he was called before the Vice-Chancellor to make an agreement with the liquidator for the carrying on of the works he ought to have said, "I am the vendor in possession, and as the vendor in possession I have a right to carry on the works by the terms of the agreement on certain terms, and on certain security, and that I shall do, and I

do not want your consent to my doing that." But instead of that, he entered into an agreement which is on a totally different footing, and under which he gets a charge on all the debts, and is empowered to collect them, which is a different charge. It seems to me that there is a complete inconsistency between his being vendor in possession and his having the rights which are given him by this agreement in December, 1866, and it is clear that this rent, rates, and taxes, were advances under the agreement of December, 1866, and he can have the security given to him by that agreement, and no other security.

That security does not touch the property which had been previously charged for the benefit of the debenture holders, as in fact it could not have touched it, even if it professed to do so.

I agree also with what the Lord Justice has said, that there is no information to induce us to order further inquiries, and that we must decide this case on the facts which are before us on the settled statement.

BAGGALLAY, J.A.: I am of the same opinion, and for the same reasons as have been given by the Lords Justices. I do not think it desirable to add anything.

424] *BRETT, J.: As I understand it, two main questions are raised here: first, whether the order of the Vice-Chancellor can stand as it is; and, secondly, if it cannot, whether certain variations which have been suggested should be made in it.

As I understand the case, the question is, whether the order that the proceeds of a certain sale should be paid to Grissell before the debenture holders, so far as to repay him his advances, is erroneous. The argument on one side is, that the order of the Vice-Chancellor should be sustained because the disbursements to which this priority is given were made under an order of the Vice-Chancellor, that that order did give to Grissell this priority over the debenture holders, and that the Vice-Chancellor was justified in making such an order. On the other side it is said that no order at all was made by the Vice-Chancellor; that there was on the 22d of December an agreement between the liquidator and Grissell; that if this agreement was an order of the Vice-Chancellor, upon the true construction of it, it does not give this priority to Grissell; and that if it were an order, and the true construction of it were that it does give this priority, or assume to give this priority, that it would be an order that the Vice-Chancellor was not entitled to make,

Now, in the first place, it is said that it is an order, because it has been approved of by the Vice-Chancellor. But that argument seems to me to go this length, to say that everything which is done in a voluntary winding-up under the supervision of the court is done under an order of the court, and it would make a voluntary winding-up under supervision the same thing as a winding-up under the order of the court. I cannot think that the meaning of the act of Parliament is, that the approval of the court to things which are done in a voluntary winding-up under its supervision amounts to an order of the court in any way.

But if this were an order, it seems to me that it does not give that priority; and, certainly, if it were an order, and, if upon the true construction of it, it did give this priority, it seems to me that the court could not by any order of its own take away from the debenture holders any rights which they had. Now the debenture holders, by the terms of the mortgage to them, have a *mortgage on the leaseholds [425 and machinery and plant of this company, and that was a first charge upon it, and no subsequent agreement by anybody except themselves, and no order of any court could take away that priority from them. Therefore I think it was not an order, and if it were an order, the interpretation put upon it by the Vice-Chancellor in his last order was incorrect, and that if it were an order, and if his construction were right, then it was an order which he could not make as against these debenture holders. Therefore I think that the order cannot stand as it is.

Then I come to the question whether it should be varied as suggested by Mr. Cotton. Now the first point raised about that is with regard to these alleged payments of rent, rates, taxes, and insurance. I will accept the alleged doctrine, that if he had been the unpaid vendor in possession, as unpaid vendor he might have made those payments, but I do not think that he was in this case in possession as unpaid vendor. By the original agreement of sale he might have gone into possession as an unpaid vendor, but if he had done so the business must have been his own. It may be said that in one sense he was actually in possession, that is, he was the person carrying on the business, but he was there, not as unpaid vendor, which would have made the business his own, and him liable for everything, but he was there as director for the company—in other words he took possession for the company, and not on his own account as unpaid vendor; and certainly, after the agreement of the 22d of December, it seems to me, for the reasons given by Lord Justice

Mellish, impossible to suggest that he was in possession as unpaid vendor. When he paid the rent, rates, taxes, and insurance, he certainly did not pay them in the character of unpaid vendor in possession. I think, therefore, that the alleged doctrine cannot apply.

With regard to the other suggestions, I should have thought that if any part of this fund had been the proceeds either of materials sold or of plant or machinery bought by him after the 22d of December, that such plant and machinery, or the proceeds of such materials, should not have gone to these debenture holders, and I should have thought that an inquiry ought to be made. But I can find nothing 426] but a suggestion made in court that anything of *the kind has taken place, and certainly that suggestion is absolutely contrary to the finding in the statement before us. I therefore think that is a matter which ought not to be noticed, and in respect of which no order of the court ought to be made.

Higgings, Q.C., and *Hastings*, Q.C., for the liquidators, then proceeded to argue against the claim for priority of the debenture holders: This company is the creature of the act of 1862, and its assets must be administered according to that act, which provides expressly for the costs of the liquidators. The debenture holders have allowed liquidators to be appointed, and have had the benefit of their labor, and must allow them their costs and remuneration. But for that, the whole property would have been lost. They were appointed by the court, and the court must provide for their costs. If it had been a suit either as plaintiffs or as receivers, they would have had their costs: *Perry* v. *Oriental Hotels Company* (1). The act expressly provides by sect. 133 that the liquidators may carry on the business, and if so, they must have their costs. The debenture holders cannot be allowed to lie by for nine years and then come and claim the benefit of all that has been done without paying for it.

JAMES, L.J.: I am of opinion that the claim on behalf of the liquidators cannot be sustained. No doubt it is a very hard case for them that they have had to deal with an insolvent company, but they ought to have looked into that matter before they incurred expenses and made themselves liable. Those who render services to an insolvent company, or an insolvent person, frequently find they have to go without payment, and the liquidators should not have incurred

(1) Law Rep., 12 Eq., 126.

disbursements which they had no means of being reimbursed. I do not wish to refer to what I said myself on the former occasion, except that it was an order of the Court of Appeal made upon consideration of this matter, and it appears *that the only thing which could be left open [427 was the costs of the preservation and of the sale of the property; but the costs of the liquidators in the liquidation, and the ordinary costs of the proceedings, were not in any way to be even kept open from that day to this as between the liquidators and the debenture holders. The debenture holders are the creditors to whom the property belonged; they were creditors of the company independently, but besides being creditors of the company they had a specific right to the property for the purpose of paying their debts. If the property is realized in the proceedings to which they are parties they must pay the costs of the realization, just as they would have had to pay them if they had their own suit for the purpose of realizing it, or if they had employed a person out of doors. Those are charges to be deducted out of the proceeds of the property, and they are only entitled to the net proceeds of the property.

No doubt, as I said before, it has been argued that there were costs of preservation, which means that by keeping the thing going for some years the property ultimately realized more for the debenture holders than it would have otherwise realized. But this is merely a surmise which we cannot adopt, and even if it were true it would really make no difference whatever. The services rendered in that way affected the mortgagors, and though continuing the business might ultimately tend to make the property fetch more, it cannot create a charge against the mortgagee. The only costs for the preservation of the property would be such things as have been stated, the repairing of the property, paying rates and taxes, which would be necessary to prevent any forfeiture, or putting a person in to take care of the property. It is quite clear from all that we know in this case here that these liquidators never paid anything of that kind. The property which is the subject-matter of these proceedings, that is to say, the leaseholds, machinery, and plant, never has been the subject of expenditure on the part of the liquidators.

That being so, I think the Vice-Chancellor quite right in confining the order to the costs of realization.

MELLISH, L.J.: I am of the same opinion.

*BAGGALLAY, J.A.: I also am of the same opinion, [428 though I cannot but regret that gentlemen should be placed

in the position in which these gentlemen appear to have been placed for so many years. But this is one of the risks that those who engage in a profession of this kind must run. I regard this question as one entirely between the liquidators and the debenture holders, and it may be possible that the liquidators may have claims against particular debenture holders with respect to the course they may have taken. With regard to that I desire to say nothing, but considering this merely as a question between liquidators and debenture holders as a body, it appears to me there is no claim whatever beyond that which the Vice-Chancellor has allowed, namely, that in respect of the realization of the property.

BRETT, J.: I am of the same opinion.

MINUTES: Vary order of Vice-Chancellor, and make a declaration that the costs of Grissell and the liquidators properly incurred in realizing the properties comprised in the debenture security are to be paid out of the fund: and, subject thereto, the fund belongs to the debenture creditors. Debenture creditors to add their costs of appeal to their debt. Liquidators to have their costs, less any costs occasioned by their appeal out of the fund. No costs to Grissell.

Solicitor for Financial Society: *G. M. Clements.*
Solicitor for other parties: *C. Morgan.*
Solicitors for liquidators: *Argles & Rawlins.*
Solicitors for Grissell: *Bircham & Co.*

[3 Chancery Division, 429.]

V.C.M., Dec. 14, 1874: C.A., Dec. 14, 20, 1875; Jan. 29, 1876.

429] *ROACH V. TROOD.

[1872 R. 33.]

Fraudulent Appointment—Void Condition annexed to Appointment—Benefit of Appointee—Contemporaneous Re-settlement—Family Arrangement.

Under a marriage settlement made in 1820, a father had a power of appointment among his children. He afterwards borrowed the funds subject to the power, amounting to £6,000, from the trustees of the settlement, on the security of a freehold estate which was his own property.

On the marriage of his only daughter in 1853, the father settled a sum of £3,000 upon her out of his own property.

In 1863, the father executed three deeds of even date. By the first, he made a voluntary settlement of the freehold estate with some other property on his eldest son, E, for his life, with remainder for the benefit of E.'s children or remoter issue, as E should appoint, and in default of appointment, to E.'s children equally, and in default of children, to himself in fee.

By a second deed, the father appointed the whole of the £6,000 under his marriage settlement to E., absolutely; and the same deed contained a release by the father and his wife, and also by E. and the surviving trustee of the settlement, of the mortgage debt of £6,000, and a conveyance by the same parties of the freehold estate discharged from the mortgage to the uses of the voluntary settlement of even date.

By a third deed, the father gave the residue of his property to his only other son, R.

The father made his will, bearing the same date, and thereby confirmed the three deeds of even date, and charged his ultimate remainder under the first deed with £3,000, in favor of his only daughter, M., and subject thereto, gave the same to R.

The father died in 1864.

E., although made a party to the two first-mentioned deeds of even date, was not consulted on their preparation, and he at first refused to execute them, but he did in fact execute them in the year 1871:

Held (reversing the decision of Malins, V.C.), that in the opinion of the court the arrangement by which the mortgage debt of £6,000 had been released and the ultimate remainder reserved to the father had not been made for the purpose of benefiting the appointor; and that the appointment was not fraudulent or invalid:

Held, also, that the condition annexed to the appointment, that E. should release the estate from the mortgage debt, was not binding upon E. until he assented to the arrangement; and that he might have claimed the benefit [430 of the absolute appointment in his favor discharged from the condition, but that, having executed the deeds, he had by his voluntary act assented to be bound by the conditions.

Re Marsden's Trust (1) and *Topham* v. *Duke of Portland* (2) distinguished.

THIS was an appeal from a decision of Vice-Chancellor Malins.

By the settlement made in contemplation of the marriage of Edward Trood with Mary Smith, and dated the 14th of January, 1820, it was declared that the trustees should stand possessed of certain bank annuities upon trust to permit the said Edward Trood to receive the income during his life, and after his decease to pay the income to the said Mary Smith for her life, and from and after the decease of the survivor of them, upon trust to assign and make over the said bank annuities unto and amongst or in trust for the benefit of all and every or such one or more of the children of the marriage as the said Edward Trood should by deed or will appoint, and in default of appointment, as the said Mary Smith, if the survivor, should appoint, and in default thereof to assign and make over the trust moneys unto all the children or issue of the said then intended marriage, as tenants in common.

There was issue of such marriage four children only, viz., the defendant Edward Trood, who was the eldest son, the defendant Robert Trood, and the plaintiff Mary Roach, all of whom attained the age of twenty-one years in the lifetime of their father, and Thomas Trood, who died an infant. The trustees of the settlement received and realized the funds subject thereto, and on the 28th of March, 1827, lent the same, which then amounted to the sum of £6,000 sterling, to Edward Trood, the father, upon a mortgage in fee of a certain farm known as Bowhay and Mays, situate in the parish of Exminster, in the county of Devon.

Upon the occasion of the marriage of his daughter, the plaintiff Mary Roach, in 1853, Edward Trood the elder

(1) 4 Drew., 594. (2) Law Rep., 5 Ch., 40.

made a provision for her to the amount of £5,000, and ten years later he determined to make a disposition of the residue of his property in favor of his two sons; his property then consisted of the said farm called Bowhay and Mays, 431] subject to the mortgage for £6,000 *to the trustees of his marriage settlement, and of certain other freehold properties in the county of Devon, including about eight acres of marsh land in the parish of Alphington, and an undivided moiety of certain other lands in the parish of Crediton. He was also possessed of live and dead stock, and other personal estate of considerable value.'

For the purpose of effectuating this determination he caused three several indentures, respectively dated the 6th of April, 1863, to be prepared. The first of these indentures was expressed to be made between the said Edward Trood the elder of the first part, the defendant Edward Trood of the second part, and the defendant Robert Trood of the third part, and thereby, after reciting that the said Edward Trood the elder, in consequence of his increasing infirmities and advanced age, had determined to relinquish the management of his affairs and to make an immediate provision for his two sons, which provision as to the defendant Edward Trood was to be as thereinafter expressed, it was witnessed that the said Edward Trood the elder did thereby grant unto the defendant Edward Trood, his heirs and assigns, the said farm and lands called Bowhay and Mays, and also the said marsh land at Alphington and the pew known as Bowhay Pew in Exminster church, to hold the same to the use of the defendant Edward Trood during his life, with power in the event of his marriage to charge the said hereditaments and premises with an annuity not exceeding £100 for his wife or widow, and from and after the decease of the defendant Edward Trood, upon and for such uses and trusts for the benefit of the children or more remote issue of the defendant Edward Trood as the defendant Edward Trood should by deed or will appoint, and in default of such appointment, then to the use of all the children of the defendant Edward Trood as tenants in common: And in the said indenture was contained a proviso that if there should be no child of the defendant Edward Trood who should acquire an interest in the said hereditaments and premises under the provisions therein contained, the said hereditaments and premises should go over and be to the use of the said Edward Trood the elder, his heirs and assigns, forever: And by the same indenture the said Edward Trood the elder granted and assigned to the defendant Edward Trood, his

heirs, executors, *administrators and assigns, the [432 said undivided moiety of marsh land in the parish of Crediton, and also all the live and dead stock and other personal estate and effects therein particularly mentioned and described.

The second indenture, also dated the 6th of April, 1863, was expressed to be made between the said Edward Trood the elder of the first part, Mary Trood, his wife, formerly Mary Smith, of the second part, the defendant Abraham Smith (who was the devisee of trust estates of the surviving trustee of the aforesaid marriage settlement) of the third part, the defendant Edward Trood of the fourth part, and John Geare of the fifth part, and, after reciting the indenture of settlement of the 14th of January, 1820, the indenture of mortgage of the 28th of March, 1827, and the deed of gift of even date, and further reciting that the said Edward Trood the elder and Mary his wife were respectively desirous that the said hereditaments should be enjoyed by the defendant Edward Trood and his issue pursuant to the limitations contained in the said deed of gift discharged from the said mortgage, and that it had been accordingly agreed that the aforesaid settled moneys should be appointed and the said hereditaments released and conveyed in manner thereinafter expressed, and further reciting that, in consideration of the defendant Abraham Smith joining therein, it had been agreed to execute such release as was thereinafter contained in relation to the trust of the said settlement, it was witnessed that the said Edward Trood the elder, in exercise of the power for that purpose given to him by the said indenture of settlement, did thereby irrevocably appoint that from and after the decease of the survivor of them the said Edward Trood the elder and Mary his wife, all and singular the trust funds or property comprised in or affected by the said indenture of settlement should remain and be upon trust for the absolute benefit of the defendant Edward Trood, his executors, administrators and assigns: And by the same indenture it was further witnessed that the said Edward Trood the elder in respect of his life interest, and the said Mary Trood in respect of her reversionary interest in the moneys secured by the said mortgage, and the defendant Edward Trood in respect of his right to the capital of the moneys secured by the said mortgage in expectancy upon *the death of his said parents, did [433 thereby severally and respectively release, and the defendant Abraham Smith, according to his estate or interest, and by the direction of the said Edward Trood the elder

and Mary his wife, and of the defendant Edward Trood, did thereby grant and release unto the said John Geare, his heirs and assigns forever, all and singular the aforesaid lands and hereditaments called Bowhay and Mays, and other, if any, the hereditaments comprised in or subject to the operation of the said mortgage, to hold the said hereditaments and premises unto the said John Geare, his heirs and assigns forever, freed and discharged from the said security, but to such uses, upon such trusts, and with and subject to such powers and provisions as were in and by the said indenture of even date expressed and declared of and concering the same.

These two deeds were executed by the several persons expressed to be parties thereto, other than the defendant Edward Trood and the said John Geare, at or about the time of the date thereof, but neither of the said deeds was then executed by the defendant Edward Trood, who refused at first to concur in them, but ultimately executed them in the year 1871.

By the third indenture, dated also the 6th of April, 1863, the said Edward Trood the elder gave to the defendant Robert Trood the residue, or the greater part of the residue, of his property.

On the same day, the 6th of April, 1863, the said Edward Trood the elder executed his will of that date, and by such will, after certain specific and pecuniary legacies, he confirmed the deeds of gift respectively executed by him in favor of his two sons and of the children or other issue of the defendant Edward Trood; and after referring to the contingency upon the happening of which the estate called Bowhay and Mays and the marsh land in the parish of Alphington were limited to the use of himself, his heirs and assigns, and expressing his desire to provide for the happening of such contingency, he declared that upon the happening thereof the said lands and premises should be charged with the sum of £3,000 for the children of his daughter, the plaintiff Mary Roach, in equal shares, and subject to such charge, and to the estates, rights, or interests of those in
434] whose favor the said deed of gift *was made, he devised the said estate and marsh land, as well as all the real and personal estate and effects whatsoever over which he retained the power of disposition, unto his son Robert, his heirs, executors, administrators and assigns, absolutely.

Mary Trood died in February, 1864, in the lifetime of Edward Trood the elder, and Edward Trood the elder died on

the 14th of September, 1864, without altering his will, which was duly proved.

After the death of Edward Trood the elder, the defendant Edward Trood disputed the validity of the three deeds of the 6th of April, 1863, alleging that they had been obtained by fraud and undue influence of the defendant Robert Trood, and on the 7th of April, 1865, he filed a bill to which the defendant Robert Trood and the plaintiffs were made defendants, and thereby prayed that the said three deeds might be set aside. Such suit, however, was not proceeded with, and in the early part of the year 1866 the bill therein was dismissed with costs on the application of Edward Trood, the plaintiff in the suit.

The present bill was filed by Mary Roach and her husband against her two brothers, Edward Trood and Robert Trood, alleging that the appointment was made by Edward Trood the elder, not for the benefit of his son, the defendant Edward Trood, but with the object of relieving his own estate from the obligation to pay the sum of £6,000, and of enabling him to dispose of his estate called Bowhay and Mays, freed from the mortgage created thereon for securing the said sum; and it prayed for a declaration that the appointment of the sum of £6,000 in favor of Edward Trood was fraudulent and void as against the plaintiffs, and that their one-third share ought to be raised by mortgage out of the Bowhay and Mays estate.

The case came on for hearing before Vice-Chancellor Malins on the 14th of December, 1874.

J. Pearson, Q.C., and *Freeling*, for the plaintiff.

Glasse, Q.C., and *Bevir*, for Edward Trood.

Cotton, Q.C., and *Chapman Barber*, for Robert Trood.

Marten, Q.C., and *Morshead*, and *Badcock*, for other parties.

*Malins, V.C., after stating the facts of the case, [435 continued:

There is no question whatever that Edward Trood the elder might properly on that occasion, without assigning any reason, have made an absolute appointment of £6,000 to the eldest son, Edward, or to any other of his children, because he had an exclusive power of appointment, and therefore could have given all to one, or divided it as he thought fit. If, therefore, he had executed a deed by which he simply appointed the £6,000 to Edward, no objection could have been raised.

Then it has been said by Mr. Glasse and Mr. Bevir (and I entirely agree with the cases that have been cited on that

point) that in these cases of appointments you must look at the surrounding circumstances and see what was the real transaction. If Mrs. Roach had been brought into this arrangement and had got any benefit, and I could see that it was a proper family arrangement, I should be willing to adopt the principle laid down in *Askham* v. *Barker* (1), and by Vice-Chancellor James in *Cooper* v. *Cooper* (2), and to have supported this appointment. Unfortunately, the business did not take that shape, for having first of all settled this estate, which was subject to the charge of £6,000, upon the son for life, with remainder, as I have stated, to the children, and remainder in reversion to himself in fee, he executed another deed of the same date, which is sought to be impeached. [His honor then stated the material contents of the second deed, and also of the third deed of even date, and continued:] Edward Trood also made his will on the same day, the effect of which is to confirm these transactions and to give Robert Trood his whole property, subject only to this, that on the happening of a certain event—namely, the failure of Edward's issue—£3,000 was to go, not to the daughter, but to her children. I was at first under the impression that there would be in effect a case of election against the daughter; but as the gift is not to herself and children, no case of election arises, and only in a certain event the £3,000 goes to the daughter. Up to the 6th of April, 1863, it is perfectly clear that the daughter had vested in her, subject to its being divested by the execu-
436] tion of the power, one-third of the £6,000, *and if the settlement stands, she is divested of that by the deed of the next day.

The question is, can this transaction stand? If there is an appointment for the benefit of the objects of the power, there being no corrupt motive and no bargaining by the father for himself, then she is deprived of any interest in the fund; but when I find that the appointment is in fact to Edward only for life, with remainder to his issue not objects of the power, with remainder to the testator, who is the donee of the power and cannot exercise it for his own benefit, I cannot do otherwise than come to the conclusion that there has been that degree of irregularity in the execution of the deed that the result is, without any compensation to the daughter for the interest vested in her before this power was executed, she is by this transaction deprived of all interest, while the attempt is to confer that interest upon persons some of whom are not objects of the power—

(1) 17 Beav., 37. (2) Law Rep., 8 Eq., 322.

namely, Edward, his children (if he had any), and the testator himself, who by his will disposes of the interest which he acquired under it.

I am unable to bring this case within any of the decisions relied on by the defendant Edward Trood's counsel; but I think it does fall within the cases relied upon by the other side, namely, *Topham* v. *Duke of Portland* (1) and *Re Marsden's Trust* (2), where it was decided that if there be any collateral advantage to persons who are not objects of the power, however good the intention, that is enough to vitiate the appointment. The recitals in the deed show the object was not to give the property absolutely to Edward, but to release the estate of which he was made tenant for life, for the benefit of him and those interested in it. In my opinion that vitiates the appointment. There will therefore be a declaration that the appointment is invalid so far as it affects the interests of the plaintiff.

From this decision the defendant Edward Trood appealed, and the appeal came on for hearing on the 14th of December, 1875.

Chitty, Q.C., and *B. B. Rogers*, for the appellant: We contend, first, that there was a good appointment to Edward *Trood, followed by a void condition that he should [437 release the estate from the mortgage, which condition he had a right to neglect: Sugden on Powers (3); Farwell on Powers (4); *Alexander* v. *Alexander* (5); *Sadler* v. *Pratt* (6); *Woolridge* v. *Woolridge* (7); *Churchill* v. *Churchill* (8); *Lassence* v. *Tierney* (9); *Kellett* v. *Kellett* (10).

Secondly, we say that the appointment was good, although made with a view to a contemporaneous resettlement by the defendant Edward Trood. Such an appointment is good, provided there is no bargain between the appointor and ap-appointee, and there was no bargain here: *White* v. *St. Barbe* (11); *Birley* v. *Birley* (12); and such appointments will be upheld even though the deed of appointment may be incorrectly framed. There would have been no objection to the present appointment if the release had been made by a separate deed, and the court will not allow the appointment to fail merely because what ought to have been done

(1) 1 D. J. & S., 517; Law Rep., 5 Ch., 40.
(2) 4 Drew., 594.
(3) 8th ed., p. 526.
(4) Page 235.
(5) 2 Ves. Sen., 644.
(6) 5 Sim., 632.
(7) Joh., 63.
(8) Law. Rep., 5 Eq., 44.
(9) 1 Mac. & G., 551.
(10) Law Rep., 3 H. L., 160.
(11) 1 V. & B., 399.
(12) 25 Beav., 299.

by two deeds has been done by one: *Daniel* v. *Arkwright* (1); *Re Gosset's Settlement* (2); Sugden on Powers (3). It is true that the appointor reserved to himself the ultimate remainder, but an appointment is not necessarily void because the appointor may derive a benefit from it. The question is whether the appointor was influenced in making the appointment by the possible benefit which he might receive: *Cooper* v. *Cooper* (4); *In re Huish's Charity* (5); *Askham* v. *Barker* (6); *Vane* v. *Lord Dungannon* (7). In the present case the appointor was advanced in life, and the possible benefit which he might receive was very trifling, and on the other hand the benefit given to Edward Trood by the whole transaction was substantial, and far exceeded the value of the ultimate reversion. The two cases of *Topham* v. *Duke of Portland* (8) and *Re Marsden's Trust* (9), which are relied on by the other side, are 438] *distinguishable, for in both these cases the whole purpose of the appointments was unjustifiable.

Thirdly, we say that if the gift is not fraudulent, it cannot be impeached merely on account of the transaction conferring a benefit on persons who are not objects of the power, but it is good to the extent of the life estate of the defendant Edward Trood. The life estate may be severed from the limitations to the children and the ultimate remainder to the appointor.

Badcock, for an infant child of the appellants.

J. Pearson, Q.C., and *Freeling*, for the plaintiffs: The appointment is fraudulent and void *in toto*. The whole transaction is indivisible, and the intention of the appointor was that persons should be benefited who were not objects of the power. *Topham* v. *Duke of Portland* (8) and *Re Marsden's Trust* (9) are precisely in point. It is said that the same result might have been produced legally if the appointor had taken some other course; but powers must be strictly executed, and the court has never encouraged laxity in dealing with them.

It is also contended that the appointment, though void in part, may be upheld as to the life interest of Edward Trood. But the court cannot separate the good limitations from the bad without disturbing the whole effect of the settlement. The limitation to the children, and the ultimate remainder to the appointor, are essential parts of the transaction. If the appointor had been told that the limitation beyond the

(1) 2 H. & M., 95.
(2) 19 Beav., 529.
(3) 8th ed., p. 671.
(4) Law Rep., 8 Eq., 312; 5 Ch., 203.
(5) Law Rep., 10 Eq., 5.
(6) 17 Beav., 87.
(7) 2 Sch. & Lef., 118.
(8) Law Rep., 5 Ch., 40.
(9) 4 Drew., 594.

life estate would fail, he would never have made the appointment at all: *Hamilton* v. *Royse* (1); *Birley* v. *Birley* (2); *Carver* v. *Richards* (3); *Salmon* v. *Gibbs* (4); *Thacker* v. *Key* (5); *Askham* v. *Barker* (6).]

Cotton, Q.C., and *Chapman Barber*, for Robert Trood.

Marten, Q.C., and *Morshead*, for the trustee.

B. B. Rogers, in reply, referred to *Wallgrave* v. *Tebbs* (7); *Rucker* v. *Scholefield* (8); *Daniel* v. *Arkwright* (9). [439

1876. Jan. 29. BAGGALLAY, J.A., delivered the judgment of the court (James, L.J., Mellish, L.J., and Baggallay, J.A.) as follows:

The question involved in this appeal is, whether an appointment of a sum of £6,000, bearing date the 6th of April, 1863, and expressed to be made in the execution of a power conferred upon one Edward Trood by the settlement made on his marriage in January, 1820, was a valid exercise of such power.

The appointment is in form an absolute appointment in favor of the defendant Edward Trood, who was the eldest son of the appointor and an object of the power, but its effect, when taken in connection with the provisions of a deed of gift of even date, is to confer benefits not only upon the defendant Edward Trood, but also upon other persons, including the appointor himself, who were not objects of the power. On the part of the plaintiffs, it is contended that when the real nature and character of the transaction are inquired into, there is clear evidence that the intention of the appointor was to relieve himself from certain obligations to which he was subject, and not to benefit his son, and that the attempted appointment was consequently wholly void.

This is the reason assigned by the plaintiffs in the 20th paragraph of the bill, and is the foundation upon which they base their claim for relief, but it has been further contended on their behalf in the arguments at the bar, that even assuming that the appointment ought not to be set aside for the reason so assigned, yet that no effect, or at any rate a partial effect only, can be given to it by reason of its provisions being in favor partly of an object of the power and partly of persons who are not objects of the power.

The solution of the two questions thus raised by the plaintiffs necessitate a careful consideration of all the circum-

(1) 2 Sch. & Lef., 315, 331.
(2) 25 Beav., 299.
(3) 1 D. F. & J., 548.
(4) 3 De G. & Sm., 343.
(5) Law Rep., 8 Eq., 408.
(6) 17 Beav., 37.
(7) 2 K. & J., 313.
(8) 1 H. & M., 36.
(9) 2 H. & M., 95.

stances of the case. The facts are not in dispute, and are as follows: [His Lordship then referred to the facts and read 440] the material parts of *the deeds as stated above, and continued:] Such being the facts of the case, the first question to be determined is whether, by fair and reasonable inference from such facts, the charges of fraud asserted by the plaintiffs, and upon which, so far as the allegations in the bill are concerned, they rest their case, are established.

The charge in the 20th paragraph of the bill is to this effect: that the appointment was made by Edward Trood the elder, not for the benefit of his son, the defendant Edward Trood, or with the intention that he should receive any part of the sum of £6,000 for his own use, but with the object and for the purpose of relieving the estate of the said Edward Trood the elder from the obligation to pay the said sum, and of enabling him to dispose of his estate called Bowhay and Mays, freed and discharged from the mortgage created thereon for securing the said sum; and they further charge in the 21st paragraph that such attempted appointment was fraudulent and void as against the plaintiffs, and that the said sum of £6,000 is now divisible as in default of appointment.

Now there is abundant authority for the proposition that when an appointment has been made with the intention of defeating the purposes of the power, it will be treated as wholly invalid, even though it may to some extent apparently effectuate such purposes; but is it to be fairly and reasonably inferred from the circumstances of the present case that Edward Trood the elder had any intention of defeating the purposes of the power which he was entitled to exercise?

The fact that under the provisions of an appointment, whether such provisions appear upon the face of the instrument itself, or are to be gathered from extrinsic evidence, some persons who are not objects of the power may take interests in the appointed fund, either in conjunction with or in succession to persons who are objects of the power, is not of itself sufficient to invalidate the appointment. The reports abound with cases in which such appointments have been upheld.

Nor, again, does the fact, that the donee of the power may derive a benefit under the appointment, necessarily render the appointment invalid. In *Beere* v. *Hoffmister*.(') a husband and wife had power to appoint a fund to their children, 441] which fund in *default of appointment was settled on

(') 23 Beav., 101.

all the children who should attain twenty-one, and in default of children who should acquire an interest, on the next of kin of the wife. There being but one child, aged three years and a half, and the wife being seriously ill, the husband and wife appointed the whole fund to the child, reserving a joint power of revocation. The child died two years afterwards, and her father thereupon became entitled to the fund, and on the validity of the appointment being questioned it was upheld.

On the other hand, in the case of *Wellesley* v. *Earl of Mornington* (1) an appointment made by a father in favor of his son, who, though of full age was of unsound mind and in very precarious health, and who shortly afterwards died intestate, was set aside at the instance of the daughter of the donee of the power.

The distinction in principle between the two cases is obvious: in neither case was the contingent interest reserved to the donee of the power very remote, but in each case his intention in making the appointment had to be gathered from the surrounding circumstances, and while in the latter case it was abundantly evident that the intention was to benefit himself at the cost of his daughter who was an object of the power, it was equally clear in the former that the intention was not to benefit himself, except in the event of the death of his daughter.

The case of *Re Marsden's Trust* (2) has been much relied upon by the plaintiff's counsel in support of their contention that the appointment in the present case is wholly void, but the facts of that case were of a very special character, and Vice Chancellor Kindersley in the course of his judgment expressly stated that in the view which he took of the evidence the power had been exercised in such a way as to defeat the purpose for which it was given. The appointment in that case was made by a mother about a year before her death in favor of a daughter who was under twenty years of age, and the eldest of several children, all of whom were objects of the power, and it extended to the entirety of the fund which was the subject of the power. It was, however, the intention of the appointor and of her husband that as soon as the daughter attained the age of twenty-one years she should be *informed that the appointment had [442 been made to her in order that she might make over one-half of the fund to the father absolutely, and give him a life interest in the other moiety. The daughter did not become aware of this intention until she was informed of it by her

(1) 2 K. & J., 143. (2) 4 Drew., 594.

father after she had obtained her majority, and on the validity of the appointment being questioned on behalf of the other objects of the power the daughter was advised to claim the whole benefit of the appointment for herself. The Vice-Chancellor declared the appointment void, and it is evident that to have upheld it in such a case would have been to give effect to the intentions of the father and mother, and to have defeated the real purpose of the power.

The case of *Topham* v. *Duke of Portland* (1), which was also much relied on by the plaintiffs' counsel, was decided both by the Vice-Chancellor James and the Court of Appeal on similar grounds. As was observed by Lord Hatherley in the course of his judgment, a former appointment had been set aside on the ground that the appointee was a mere instrument for effecting the purpose of the donee of the power, which was foreign to that which was the true purpose of the power, and that while he gave implicit credence to the statements of both the appointor and appointee that the absolute appointment in favor of the latter had been made without any agreement between them, he inferred from all the evidence before him, and particularly from that of the appointee herself, that she was still under the same influence, and would still be a passive instrument to effect the purposes of the appointor.

It was upon the authority of these two cases that the Vice-Chancellor, though apparently unwillingly, and because he considered himself bound by them, made a decree in the plaintiffs' favor, against which decree the present appeal is brought. After a very full consideration of all the circumstances of the present case, we are unable to arrive at the conclusion that they were such as to bring it within the authority of *Re Marsden's Trust* (2), or of *Topham* v. *Duke of Portland*, or of any other of the reported cases in which appointments have been set aside on the ground of corrupt or fraudulent intention. It is admitted that the value of the

443] *life and absolute interests made over to the defendant Edward Trood by the two deeds of April, 1863, exceeded the value of the reversionary interest expectant on his death in the £6,000, and having regard to the provision at the same time made for the son Robert, and to that previously made for the daughter, Mrs. Roach, on the occasion of her marriage, there is nothing on the face of the transaction, nor is there anything in the evidence, to indicate that it was made with the intention of benefiting Edward Trood the elder, or that it was other than part of a fair and reasonable division

(1) Law Rep., 5 Ch., 40. (2) 4 Drew., 594.

of a father's property amongst his children. And this view of the case is supported by a consideration of the provisions of the will of Edward Trood the elder of the same date as the deeds, which provisions, though they were necessarily revocable, clearly indicated that at the time when the deeds and the will were executed by Edward Trood the elder, he had no intention of deriving any advantage for himself from the exercise of the power, inasmuch as by his will he made over for the benefit of his son Robert and the children of his daughter any interest which he or his estate might derive from the happening of the contingency of his eldest son dying without having had any issue capable of taking under the deed of gift.

Upon the whole, we are of opinion that a case has not been established for setting aside the deed of the 6th of April, 1863, on the ground of its having been made with any such corrupt or improper intention as is alleged in the plaintiffs' bill. But though the appointment ought not to be set aside upon the grounds just adverted to, the second question raised by the plaintiffs remains to be considered, and that is what is the effect, if any, to be given to it, for it may well be that an appointment may not be void by reason of its having been made with any corrupt or improper intention, and yet may wholly or partially fail of effect by reason of the nature of the disposition attempted to be made by it. It has been suggested, though it has hardly been argued, on behalf of the plaintiffs, that the provisions in favor of the defendant Edward Trood, and then in favor of persons who are not objects of the power, are so dependent the one on the other that they cannot be separated, and that consequently the appointment must wholly fail of effect.

*But this view of the case can clearly not be main- [444
tained. The cases in which limitations in favor of persons not objects of the power follow limitations for life in favor of persons who are objects of the power are those in which appointments have been most frequently partially maintained, and in the present case we think that the appointment must be treated as valid, at least to the extent of the life interest of the defendant Edward Trood.

The question whether any and what greater effect should be given to it is at first sight somewhat complicated by the circumstance that though the defendant Edward Trood was not a party to the arrangement under which the deeds of 1863 were executed, and for several years after his father's death refused to be bound thereby, he nevertheless, in the year

1871, executed both of those to which he was expressed to be a party.

Now, if the defendant Edward Trood had never executed the deeds, or assented to the arrangement purported to be made by them, there could, in our opinion, be no doubt as to his right to have claimed the benefit of the absolute appointment in his favor, and to have treated as void the conditions attempted to be imposed upon him of his assenting to the release of the estate from the charge. The case in such event would not have differed in principle and in circumstances from that of *Churchill* v. *Churchill* (1), in which a father, having a power of appointment among his children, by his will appointed the fund over which he had the power to his three daughters equally, and gave his residuary estate to the same three daughters equally, and then directed that the share to which each daughter was entitled, as well under the appointment as under the residuary gift, should be held in trust for the daughter for life, with remainder to her children, and in that case the appointment was held to give the daughters an absolute interest in the appointed fund.

If such, then, would have been the right of the defendant Edward Trood if he had never executed the deeds of April, 1863—a right which, as against those who would be entitled in default of appointment, he was entitled to assert at least from the date of his father's death if not from the date of the deeds—the only effect of his subsequent execution of
445] the deeds in 1871 was to impose *upon him the condition of not asserting as against those who were or would be entitled, under the provisions of the deeds, any rights or claims inconsistent with such provisions; in other words, to impose upon him, as the result of his own voluntary act, the very condition from which he would, but for such act, have been entitled to treat himself as freed and discharged.

The result of this view of the case is that the decree of the Vice-Chancellor should be reversed, and the plaintiffs' bill dismissed with costs.

Solicitors for appellant: *Coode, Kingdon & Cotton*, agents for T. Floud, Exeter.

Solicitors for plaintiffs: *Vizard, Crowder & Anstie*, agents for Holman & Bath, Glastonbury.

Solicitors for other parties: *Dobinson & Geare*, agents for Geare, Tozer & Geare, Exeter; *Yarde & Loader*, agents for W. Huggins, Exeter.

(1) Law Rep., 5 Eq., 44.

[3 Chancery Division, 445.]

C.A., May 19, 26, 1876.

Ex parte TURQUAND. *In re* FOTHERGILL.

Surety—Acceptor of Accommodation Bills—Scheme of Arrangement—Debentures issued to Creditors—Bankruptcy Act, 1869, *s.* 28.

The creditors of a firm of liquidating debtors agreed to a scheme of arrangement under the 28th section of the Bankruptcy Act, 1869, which was sanctioned by the court. Under this scheme the assets were transferred to a company, who were to carry on the business, and debentures were issued to the creditors for the amount of their proved debts, which were to be payable out of the surplus profits, after meeting certain prior charges. Among the creditors was C., who had accepted accommodation bills to a large amount for the firm, and who afterwards himself filed a liquidation petition, and paid his creditors a composition of 4*s.* in the pound. The holders of the bills thus accepted proved against C.'s estate, and received their composition amounting altogether to about £32,000. They also proved against the estate of the liquidating firm under the scheme of arrangement. Some of them received the composition before proving, and consequently only proved for 16*s.* in the pound; the others proved for the whole amount. C. then claimed to stand in the place of the bill holders as a creditor of the liquidating firm to the extent of what he had paid under the composition, and to have debentures issued to him to the nominal amount of £32,000 in their stead. His claim to stand in the place of those bill holders who had *received their composition before proving [446 under the scheme of arrangement to the extent of 4*s.* in the pound was allowed; but as to the others who had proved for the whole amount:

Held, first, that the debentures were not issued to the creditors in satisfaction of their debts, but in substitution for the dividends which under a bankruptcy would have been payable on them:

Secondly, that the scheme of arrangement made no difference in the relation between C. and the liquidating firm, namely, that of surety and principal debtor, and therefore that he had no equity to receive anything out of these assets till the creditors had been actually paid 20*s.* in the pound. His claim to debentures in respect of that part of composition was consequently disallowed.

THIS was an appeal from an order made by Mr. Registrar Brougham, sitting as Chief Judge in Bankruptcy, in the liquidation of Messrs. R. Fothergill and E. T. Hankey.

The liquidating debtors were ironmasters and colliery proprietors trading at Aberdare under the name of the Aberdare Iron Company and the Plymouth Iron Company. On the 5th of June, 1875, they filed a petition for liquidation by arrangement, which was agreed to by the creditors, and Mr. W. Turquand was appointed trustee.

There were two large mortgage debts secured on the Aberdare and Plymouth works of the debtors, and unsecured debts amounting to about £900,000. The assets available for the payment of the unsecured creditors did not exceed £15,000.

Under these circumstances the creditors, under the provisions of the 28th section of the Bankruptcy Act, 1869, on the 4th of December, 1875, passed a resolution assenting to

a general scheme of arrangment of the affairs of the debtors, and that on the approval of the scheme by the court the discharge of the debtors should be granted. A similar resolution was passed by their separate creditors on the 14th of December, and the scheme was approved by the Court of Bankruptcy on the 29th of December.

The scheme was in substance as follows:

The assets were to be handed over to a company called the Aberdare and Plymouth Company, Limited, formed to continue the business.

The mortgage debts were to be paid off by annual instalments out of the profits of the company. Fresh working capital to the amount of £36,000 was to be advanced by Mr. 447] W. S. Roden, which *sum was to be secured by the issue of A debentures of the company bearing interest at £5 per cent.

The company was to issue to each of the joint creditors (other than the said mortgagees) B debentures of the company for the amount for which such creditor had proved or should prove in the matter of the said liquidation, but not including any interest after the 5th of June, 1875.

The new company was registered on the 8th of December, 1875.

By the articles of association it was provided by clause 33 that the A debenture debt should not exceed £36,000, and should be represented by A debentures on the terms therein mentioned; and by clause 34 that the B debenture debt should not exceed the debt provable for principal and interest by the creditors of the former owners of the Aberdare property and the Plymouth property in the said liquidation, and should be represented by B debentures on the terms set forth in the 4th and 5th schedules thereinafter written, and should be issued to the said creditors.

The 4th schedule contained the form of one of the B debentures, in which it was stipulated that the company were bound to apply all the net profits of the company (after setting apart a sufficient amount to pay certain annuities amounting to £600 and the yearly instalments of the mortgages, and the yearly sum of £1,800 for interest on the A debenture debt) to the payment on account of the B debenture debt of sums to the holders of the said debentures *pari passu*. And it was stipulated that the sum thereby secured was payable only by such surplus profits as aforesaid, or on the winding-up of the company (except as to any sum which might be paid out of other sources at the option of the company), and that the holder of the deben-

tures should accept payment by such instalments as the company should think fit on such notice as therein mentioned, and that the said sum should not bear interest. The company thereby charged their undertaking, and all the property, assets, and effects thereof, with the moneys secured by the debentures subject to the prior charges; and it was also provided that until the winding-up of the company the holders of the B debenture debt should have a right to the application of profits in payment to them as aforesaid, in priority to the payment of principal moneys on account of the A debenture debt.

*The 5th schedule contained regulations as to meet- [448
ings, accounts, and other matters to be observed as between the holders of the different classes of debt of the company.

Among the joint creditors of Fothergill & Hankey was Mr. E. Corry, a metal merchant, who had accepted for their accommodation bills to the amount of more than £160,000. He filed a liquidation petition on the 4th of June, 1875, and on the 10th of August his creditors agreed to a composition of 4*s*. in the pound. The holders of the bills accepted by him proved in his liquidation, and he paid composition to them to the amount of about £32,350.

The bill holders also proved in the liquidation of Fothergill & Hankey, the drawers of the bills, and applied for B debentures corresponding with their proofs. Of these bill holders, some, namely, the London and Westminster Bank, the Union Bank of London, the London Joint Stock Bank, Messrs. Richardson, Messrs. Glyn, Mills & Co., the Alliance Bank, and the National Bank of Scotland, had received nothing under Corry's composition before making their proof, and therefore proved for their whole debt; while others, namely, the West of England and South Wales Discount Bank, the City Bank, Messrs. Gurney & Co., and the National Discount Company, had received 4*s*. in the pound upon their proof, and therefore proved for 16*s*. in the pound on the amount of their debts.

Corry now claimed to be entitled to stand in the place of the bill holders to the extent of 4*s*. in the pound, and to receive B debentures to that amount in their stead. Mr. Registrar Brougham sitting for the Chief Judge, made an order that Corry should be at liberty to prove against the estate of Fothergill & Hankey for £9,825, the amount of the composition paid to the West of England and the other firms who had proved for 16*s*. in the pound, and that, with respect to the proofs by the London and Westminster Bank and other firms who had proved for the whole amount of

their debts, Corry was entitled to stand in the place of the said several creditors to the extent of 4*s*. in the pound on the amount of their several debts, and to receive B debentures to the amount of the said composition of 4*s*. in the pound, being about £22,525.

From this decision the bill holders, in the name of the trustee in the liquidation, appealed.

449] *During the progress of the argument it was conceded by the appellants that Mr. Corry should be permitted to prove for £9,825, being the amount of composition paid by him to bill holders before tendering their proof, and the decision was therefore confined to the remaining sum of £22,525.

Benjamin, Q.C., and *Everitt* (*Horton Smith* with them), for the appellant: Mr. Corry is in the position of a surety for Fothergill & Hankey, and is not entitled to receive anything from their estate till all the bill holders have received 20*s*. in the pound. He cannot compete with his own creditors. The debentures may never produce 16*s*. in the pound; and at any rate, until they do, Mr. Corry can have no right to stand in their place: *Ex parte Marshall* (1); *Ex parte Turner* (2); *Gray* v. *Seckham* (3). The sale to the company was nothing more than a mode of realizing the assets. The debentures which each creditor was to receive were only a certificate of his share in the assets.

Roxburgh, Q.C., and Sir *H. Jackson*, Q.C. (*E. Corry* with them), for the respondent, Mr. Corry: The creditors took the debentures in satisfaction of their debts. The question is not what they are really worth, but what the nominal value was at which the creditors took them. We say they took them as representing 20*s*. in the pound. The scheme of arrangement was a general bargain between all parties interested; and by that bargain a nominal value was placed upon the shares, and that must be considered their value. They may be assigned, and at some future time the holders may actually receive 20*s*. in the pound. In that case Corry will have lost his remedy unless his right to have debentures is now acknowledged.

JAMES, L.J.: I am of opinion in this case that the order of the Registrar must be discharged. The provisions in the act of Parliament were not intended to alter the rights as between a principal creditor and a debtor. We held, in

450] a case relating to a composition with creditors, *that because a composition was voted for that did not in any

(1) 1 Atk., 129. (2) 3 Ves., 248. (3) Law Rep., 7 Ch., 680.

way tend to release the debtor, and that case involved the same points which are involved in this.

In this case the act of Parliament has said, amongst other things, in sect. 27, that instead of ordering a dividend, if you find it is not convenient to release the debtor in a particular way, you may divide the assets between the creditors; or, instead of that, by the 28th section you may do that which is equivalent, you may make an arrangement for giving something to the creditors for settling the affairs of the debtor; but that is not by way of payment of a debt, or security for or satisfaction of the debt; it is a mere substitute for the dividend which he would have been compelled to pay if the ordinary administration had been followed. The provision for enabling that to be done instead of dividing the estate, could not have been intended by the Legislature to be for the benefit of a surety who had not paid the debt himself. In this case the surety has paid 4*s*. in the pound; what is his equity against the creditor before he has paid 20*s*. in the pound? When he has paid 20*s*. in the pound he may say, "Give me up the security which you have got." But he is not now in that position.

It is said there is a debenture for the amount, but that is a thing payable in a most remote and improbable contingency, and you cannot say that was in substance a satisfaction of the debt so as to release the debtor. The estate therefore stands, in my mind, exactly as it did before.

MELLISH, L.J.: I am of the same opinion. It is perfectly clear that if bills are discounted in the market which are drawn by one firm upon another firm, and then both those firms become bankrupt or go into liquidation by arrangement, or agree to a composition, the bill holder is entitled to prove against both estates and to receive all the dividends or composition he can get from both estates until he has received 20*s*. in the pound, and whether it may turn out that the drawer is surety for the acceptor or the acceptor is surety for the drawer, yet the surety has no right to receive anything until the bill holder has received 20*s*. in the pound. Therefore *it is perfectly clear that if Fothergill & [451
Hankey's estate had been wound up in bankruptcy, or liquidation or composition, and 20*s*. in the pound had not been realized, the holders of the bills would have been entitled to have kept the 4*s*. in the pound they had got from Corry as well as the amount of the dividend or composition they got from Fothergill & Hankey. Then the sections of the Bankruptcy Act which have been referred to allow creditors to make, even after a liquidation, either a composition

with the debtor, or to make what is described as an arrangement of the affairs of the debtor. Supposing they choose to make an arrangement of the affairs of the debtor, and the majority bind the minority to enter into that arrangement, then, in my opinion, the equity of the surety in an arrangement which will probably produce more than 20*s.* in the pound to the principal creditor is this—he may make up 20*s.* in the pound to the creditors, and take the arrangement in the place of the principal creditor. In that case he gets the debentures, and in my opinion that secures him against any injustice. Let me suppose in this instance that Corry, instead of paying 4*s.*, paid 18*s.* in the pound, so that he had a substantial interest in these debentures, then he could have said, "There is your remaining 2*s.* in the pound; give me the debentures." Or possibly he might say, "Your right is only to get 20*s.* in the pound. These debentures are now saleable for 5*s.* in the pound in the market; go and sell them, and take 2*s.* in the pound to make 20*s.*, and give me 3*s.*" In that way he would get perfect justice; therefore there is no difficulty in seeing that perfect justice is done to the surety. In point of fact, this estate is so insolvent that it is plain he could never get anything if it is wound up in the ordinary way.

BAGGALLAY, J.A.: I am of the same opinion. The effect of the Registrar's order is to give Mr. Corry part of the profits which properly belong to the bill holders, and to which they are fairly entitled. It seems to me that the substantial question in the case is as to the true construction of the scheme, which appears to have been duly approved by the court under the 28th section of the Bankruptcy Act, 1869. I must confess that for some time I felt strongly im-
452] pressed with *the view that the debentures were given in satisfaction of the debts, and if they had been paid-up shares instead of debentures, I should have remained of that opinion; but as the argument proceeded I was struck by the difference between the two. If shares had been accepted, they would have been taken for better or worse; they might have turned out to be of larger or less value, but by accepting these debentures the creditors took that which could not go for more than their amount in any case, and which would in this case have resulted in very much less; therefore I am not inclined to keep to the view I first took in the matter, especially as the Lords Justices have adopted a different view from that which I had adopted.

Solicitors for appellant: *Lyne & Holman.*
Solicitors for respondent: *Wansey & Bowen.*

The holder of negotiable paper, the maker and indorser of which have both become insolvent, and who has received a dividend from one of them, cannot prove his claim against the other for the full amount mentioned in the paper. On the contrary, he must deduct the amount of the dividend received from the estate of the other party. But if, after proof made, dividends are received from another party, the creditor is, nevertheless, entitled to dividends upon the whole amount proved; provided the dividends do not exceed 100 cents on the dollar on the balance really due: Rochette *v.* Louis, 3 Quebec Law Rep., 97, citing 1 Deac. Bank. Law, 240, 1 Archb. Bank. Law, 608, 2 Bell's Com., 338–9, Ex parte Groom, 3 Mont. & Ayr., 157, Doria's Bank. Law, 685; 1 Griffith's Bank. Law, 607.

Mr. Doria cites (p. 685) to the same proposition, Ex parte Tayler, 1 De Gex & Jones, 302, 28 L. T. Rep., 375; The London Joint Stock Bank, 26 L. J. Bankr., 58; Cooper *v.* Pepys, 1 Atk., 106; Ex parte Wildman, 1 Atk., 109, 2 Ves. Sen., 113; The Oriental Commercial Bank, 18 L. T. Rep., N.S., 450, L. R., 6 Eq., 582; Ex parte Royal, etc., 19 Ves., 310, 2 Rose, 197.

[3 Chancery Division, 461.]

C.A., July 27, 1876.

*In re DAVIES. *Ex parte* KING. [461

Bankruptcy Petition—Use for inequitable Purpose—Power of Court to refuse to adjudicate.

When the court sees that a bankruptcy petition has been made use of for an inequitable purpose, as, for instance, to extort money from the debtor, it will refuse to make an adjudication, even though there is a good petitioning creditor's debt, and an act of bankruptcy has been committed.

THIS was an appeal from a decision of Mr. Registrar Brougham, sitting as Chief Judge in Bankruptcy.

On the 29th of June, 1875, a bankruptcy petition was presented by R. A. King against John Davies. The debt alleged was a sum of £176 4*s.* in respect of a bill of exchange for £175 which had been indorsed by Davies to King, and which had been dishonored at maturity. The act of bankruptcy alleged was that Davies had failed to comply with the requirements of a debtor's summons served on him by King in respect of the debt.

By an affidavit of the petitioner's solicitor it appeared that, in July, 1875, at the urgent request of a Mr. Peckhover, who stated that Davies was without the means of paying any money on account of the bill for £175, he (the solicitor) agreed to stay proceedings on the petition for three months from the 16th of July, 1875, "upon receiving £15 in cash for expenses out of pocket in presenting petition, and upon receiving a further bill indorsed by Davies for £85 for expenses and bonus for the delay." The £15 was paid, and the bill for £85 was given, but it was dishonored when it became due on the 19th of October, 1875. By the same *affidavit it appeared that on the 26th of November, [462

1875, a similar arrangement was made by King's solicitor. He then agreed, on receiving an acceptance of Davies for £100, to adjourn the petition generally, on the understanding that it would be replaced in the paper upon the 5th of January, 1876. A letter written by the solicitor stated that "the £100 is accepted, as to £70, part thereof, as a consideration for the adjournment, and for expenses which may be up to this date due from Davies to King; and as to £30, the remainder thereof, as a part payment of Davies' acceptance for £85 overdue." The bill for £100 was paid by Davies on the 1st of April, 1876. The petition was afterwards brought to a hearing on the 27th of June, 1876. Davies then alleged that the bill for £100 was paid on account of the £175, and that he knew nothing of the letter written by King's solicitor in November. The Registrar ordered that on Davies within forty-eight hours paying to King £76 4s., and depositing in court £100 to provide for the costs of the petitioning creditor, and on payment of any further costs found due upon taxation, the petition should be dismissed.

From this order King appealed.

Roxburgh, Q.C., and *Yate Lee*, for the appellant: The debtor having made default, in complying with the debtor's summons, the creditor was entitled to an adjudication as a matter of right. Other debts being due to him, he is not bound to be content with payment of the debt for which the summons was issued: *Ex parte Boss* (1). Proceedings in bankruptcy are for the benefit of all the creditors: *Ex parte Jay* (2).

De Gex, Q.C., and *Finlay Knight*, for the debtor, were not called upon.

JAMES, L.J.: I am of opinion that the Registrar was well warranted in refusing to adjudicate upon this petition. To my mind it is quite shocking that proceedings in bankruptcy should be used as a means of extorting money from a debtor 463] by way of what is called *a "bonus" for the adjournment of the hearing of the petition. By the affidavit of the petitioner's solicitor it appears that two such bonuses have been extorted in the present case. It would be a shocking thing if after this an adjudication could be made and all the debtor's transactions impeached. It has been suggested that the petitioning creditor did not himself authorize these arrangements, but that they were made by his solicitor without his knowledge. That gives a much more serious aspect to the matter, and it is unnecessary for me to say what the

(1) Law Rep., 18 Eq., 375. (2) Law Rep., 9 Ch., 133.

consequences to the solicitor might be. The appeal must be dismissed with costs.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *J. Wilson Heritage; Ingledew, Ince and Greening.*

[3 Chancery Division, 468.]

C.J.B., June 19: C.A., July 27, 1876.

In re SNEEZUM. *Ex parte* DAVIS.

Contract of Bankrupt—Disclaimer by Trustee—Provable Debt—Discharge of Bankrupt—Continuing Contract—Omission of Trustee to disclaim—Performance for a Time—Subsequent Repudiation—Damages occasioned by Breach—Personal Liability of Trustee—Proof against Bankrupt's Estate—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 22, 23, 24, 25 (*subs.* 2), 31, 49, 83 (*subs.* 7).

If the trustee of a bankrupt, when called upon to decide whether he will disclaim a continuing contract of the bankrupt, does not disclaim it, but carries it on for the benefit of the estate, he is still at liberty, when he finds it unprofitable, to cease to perform it, and in that case the other party to the contract is entitled, under sect. 31 of the Bankruptcy Act, 1869, to prove against the bankrupt's estate for the damages occasioned by the breach of the contract, and this is his only remedy.

The trustee does not by not disclaiming adopt the contract, either personally or on behalf of the estate.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

William Sneezum was a railway wagon builder at Cardiff. On the 4th of February, 1873, he filed a liquidation petition in the Cardiff County Court, under which his creditors resolved upon a *liquidation by arrangement, and ap- [464 pointed James Murphy and Nelson Hewertson trustees.

On the 1st of July, 1869, Sneezum had entered into a contract with the Leeds Railway Plant Company, Limited, to maintain and repair for them fifty railway wagons for a term of seven years from the 1st of July, 1869, and the same day he entered into a similar contract with the company to maintain and repair the fifty wagons for a further term of seven years from the 1st of July, 1876, at an annual payment of £1 10*s.* per wagon. The benefit of these contracts was assigned the same day by the company to Messrs. Davis & Son, colliery proprietors at Cardiff. On the 10th of September, 1872, Sneezum entered into another contract with Davis & Son to maintain and repair for them 100 wagons for seven years from the 1st of October, 1872, on similar terms.

On the 8th of March, 1873, the trustees disclaimed a contract which Sneezum had entered into on the 10th of January, 1873, with Davis & Son to build some wagons for them, and Davis & Son thereupon claimed to prove in the liquidation

for damages occasioned to them by reason of the disclaimer. Ultimately this claim was compromised by the payment by the trustees to Davis & Son of a sum of £1,750. On the 9th of April, 1873, Davis & Son gave the trustees notice in writing, under sect. 24 of the Bankruptcy Act, 1869, requiring them to decide whether they would disclaim the contracts of the 1st of July, 1869, and the 10th of September, 1872. The trustees gave no notice of disclaimer within the twenty-eight days fixed by sect. 24, and they in fact continued to perform these contracts until the 25th of January, 1875. On the 19th of June, 1873, Davis & Son applied to the county court for an order to restrain the trustees from disposing of the estate of Sneezum without first giving security or providing for the carrying out of the contracts. The hearing of this application was adjourned *sine die*, with liberty to Davis & Son to renew it on giving four days' notice. On the 21st of January, 1875, the application was renewed, and an order was then made restraining the trustees from distributing the assets until further order. On the 25th of January, 1875, the trustees gave notice to Davis & Son that they disclaimed the contracts of the 1st of July, 1869, and the 10th of September, 1872, and that they should cease to per-
465] form them after *the 30th of January, 1875. On the 23d of December, 1875, Davis & Son commenced an action in the Queen Bench Division against Murphy and Hewertson for damages for breach of these contracts. On the 24th of May, 1876, on the application of the trustees, an order was made restraining Davis & Son from taking any further proceedings in the action. Davis & Son appealed to the Chief Judge. The appeal came on to be heard on the 19th of June, 1876.

Finlay Knight, for the appellants: Under the old law if the assignee adopted a contract of the bankrupt he adopted it with all its liabilities: *Gibson* v. *Carruthers* (1). By sect. 23 of the present act the trustee is enabled to escape from an onerous contract by disclaiming it. But sect. 24 compels him to decide, if called on so to do, within twenty-eight days, or such further time as may be allowed by the court, whether he will disclaim or not. There would be no meaning in this provision if the trustee, having once neglected to disclaim, could at any subsequent time do so. He must make up his mind once for all. If he does not disclaim, both sides are equally bound by the contract. The trustee is personally liable; he cannot play fast and loose with the contract.

(1) 8 M. & W., 321, 333.

[He referred to *Ex parte Llynvi Coal Company* (1); *Ex parte Waters* (2); *Ex parte Chalmers* (3).]

De Gex, Q.C., *Winslow*, Q.C., and *W. Bowen Rowlands*, for the trustees, were not called upon.

BACON, C.J.: No doubt a trustee in bankruptcy is entitled to the benefit of any beneficial contract which the bankrupt has entered into. Here, there being several contracts in existence at the time of the liquidation, and the present appellants offering the trustees the option of adopting or rejecting them, the trustees say as to one of them, "We will have nothing to do with it;" and as to the others, "We will continue them." The appellants were entitled *to prove for damages for breach of the contract which [466 the trustees repudiated; they did prove, and they received out of the estate the amount of those damages, and that contract was put an end to. The other contracts went on, and the trustees endeavored to perform them. They had not to be performed once for all, but they were continuing contracts. They were performed until a time came when the trustees, finding that they could not, without disadvantage to the estate, continue to perform them, gave notice that they should cease to perform them. Then how are the appellants injured? What damage have they sustained? The contracts are broken, and a right to damages arises, and the appellants have as much right to prove for damages in respect of these contracts as they had in respect of the first, which was disclaimed. Then, what have the appellants to complain of in the conduct of the trustees? What have the trustees done to mislead them? They had the benefit of the contracts up to January, 1875, and when that benefit ceased they were entitled to prove for damages against the estate. It would be a violation of justice and common sense to hold that the trustees, who have discharged a thankless duty, should, because they have performed the contracts for a certain time, be personally liable for not performing them any longer. The contracts having been performed up to a certain point, to that extent the appellants have been benefited. I think they have no right to complain. The law affords them a complete remedy. They have, indeed, acquiesced in the proceedings, for, knowing that the trustees were going on with these contracts, they applied to the county court for an order that there should be no distribution of the estate until their demand had been satisfied, and they obtained an order to that effect. What plainer evidence could be furnished that the trustees were dealing,

(1) Law Rep., 7 Ch., 28. (2) Law Rep., 8 Ch., 562. (3) Law Rep., 8 Ch., 289.

not for their own benefit, but for the benefit of the creditors? The trustees acted in the matter according to what they considered the best mode of dealing in the interest of the estate. They neither accepted nor repudiated these contracts. As to the one which they did repudiate, the appellants have had their remedy in damages. The trustees appear to have carried on the other contracts as much for the benefit of the appellants as for the benefit of the estate, 467] and they had a right to carry them on *without becoming personally liable. I am disposed to think that sects. 23 and 24 have no application to continuing contracts such as those now before me. But whether this be so or not, the order appealed from was, in my opinion, perfectly right; and although it has not in so many words said that the appellants may prove for damages, I have no doubt that this would follow. The appeal proceeds upon an erroneous view of the law, and it must be dismissed with costs.

From this decision Davis & Son appealed. The appeal came on to be heard on the 27th of July, 1876.

Benjamin, Q.C., and *Finlay Knight*, for the appellants: We say that the question of liability would be most properly determined in the action, but we are willing that this court should decide the matter. We do not contend that the trustees are personally liable on the contract, but that they are liable as representing the estate, i.e., the creditors. By not disclaiming, the trustees, on behalf of the estate, adopted the contract with the appellants on behalf of the estate, and the contract is subject to all the ordinary legal incidents. If it is broken, the estate must pay in full the damages occasioned by the breach before any dividend is distributed to the other creditors. By sect. 23 of the Bankruptcy Act, 1869 (1), if the trustee disclaims the contract it

(1) Sect. 23 provides: "When any property of the bankrupt acquired by the trustee under this act consists of . . . unprofitable contracts, . . . the trustee, notwithstanding he has endeavored to sell, or has taken possession of such property or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication. . . . . Any person interested in any disclaimed property may apply to the court, and the court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just.

"Any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy."

Sect. 24: "The trustee shall not be entitled to disclaim any property in pursuance of this act in cases where an application in writing has been made to him by any person interested in such

*is to be deemed to be determined as from the date [468 of the adjudication, just as if the bankrupt were dead.

[MELLISH, L.J.: How can the contract have been determined from the date of the adjudication, if the trustees have carried it on for two years? Under the old law the bankrupt would have remained personally liable on the contract.]

If the creditors adopt the contract it becomes theirs, not the bankrupt's. Sect. 25 (sub-sec. 2) enables the trustee to carry on the business of the bankrupt, and sect. 83 (sub-sect. 7) gives the trustee power to make contracts on behalf of the estate. The contract must be at an end or not; if it is disclaimed, there is an end of it; if the trustee does not disclaim within the time fixed by sect. 24, the contract remains in force, and it remains with all its legal incidents; it cannot then be repudiated. Else what is the use of fixing the limit of twenty-eight days?

*[MELLISH, L.J.: The decision of the Chief Judge [469 seems practically to do away with that limit.]

Ex parte Llynvi Coal Company (1) and *Ex parte Waters* (2) show that the bankrupt is released from all personal liability on the contract. If the contract is not put an end to by a disclaimer, the estate must be liable on the contract as the contracting party. The creditors have elected to continue the bankrupt's business; they have had the benefit, and

property, requiring such trustee to decide whether he will disclaim or not, and the trustee has for a period of not less than twenty-eight days after the receipt of such application, or such further time as may be allowed by the court, declined or neglected to give notice whether he disclaims the same or not."

Sect. 25 provides: "Subject to the provisions of this act the trustees shall have power (*inter alia*) (sub-sec. 2) to carry on the business of the bankrupt so far as may be necessary for the beneficial winding-up of the same."

By sect. 31: "Demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in bankruptcy, and no person having notice of any act of bankruptcy available for adjudication against the bankrupt shall prove for any debt or liability contracted by the bankrupt subsequently to the date of his so having notice.

"Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject during the continuance of the bankruptcy by reason of any obligation incurred previously to the date of the order of adjudication, shall be deemed to be debts provable in bankruptcy, and may be proved in the prescribed manner before the trustee in the bankruptcy."

Sect. 83 provides: "The following regulations shall be made with respect to the trustee and committee of inspection (*inter alia*):

"(7.) The trustee of a bankrupt may sue and be sued by the official name of 'the trustee of the property of a bankrupt,' inserting the name of the bankrupt, and by that name may hold property of every description, make contracts, sue and be sued, enter into any engagements binding upon himself and his successors in office, and do all other acts necessary or expedient to be done in the execution of his office."

(1) Law Rep., 7 Ch., 28.

(2) Law Rep., 8 Ch., 562.

they must now accept the burden. In *Ex parte Chalmers* (') it was held that a contract for delivery of goods by monthly instalments was not put an end to by the bankruptcy of the party to whom the delivery was to be made; but still it was held that the trustee could not insist on the performance unless he paid in full for the goods, and even paid for a monthly instalment which had been delivered but not paid for before the bankruptcy.

De Gex, Q.C., and *Winslow*, Q.C., for the trustees: There is nothing in the act to attach any personal liability to the trustees; the bankrupt may have been freed from liability; it does not follow that a liability has been imposed on any one else.

[JAMES, L.J.: It seems to me that the trustee in his official character, i.e., the estate, becomes liable.

MELLISH, L.J.: Sect. 23 applies also to leases held by the bankrupt, upon the covenants of which the assignee in bankruptcy would under the old law have been personally liable, so long as he remained lessee, though he could have got rid of the liability by assigning the lease.]

That was because of the privity of estate.

[MELLISH, L.J.: My difficulty is that sect. 23 gives a right of proof against the estate when the trustee disclaims. Is there any such right when he does not disclaim?]

There is nothing in the act to make a novation of the contract, nothing to make the trustee, either personally or in his representative character, a contractor. There is nothing
470] to take away *the personal liability of the bankrupt; but sect. 31 makes that liability the subject of proof against the estate. Under the old law, as is shown by *Gibson* v. *Carruthers* (*), an assignee in bankruptcy had a right to enforce or to abandon a contract of the bankrupt. There was no personal liability on the part of the assignee. If he abandoned the contract, the bankrupt remained personally liable. But now sect. 31 substitutes for that liability a right of proof against the estate. That is the only remedy for a breach of the contract. The bankrupt is the only person who has contracted; the trustee has entered into no contract. The judgment in *Ex parte Waters* (*) shows that there is a right of proof against the bankrupt's estate if a contract made by him is broken at any time during the continuance of the bankruptcy. Sect. 31 has substituted this right for the right to sue the bankrupt, which existed under the former law,

(') Law Rep., 8 Ch., 289. (*) 8 M. & W., 321. (*) Law Rep., 8 Ch., 562.

[MELLISH, L.J.: Suppose that in consequence of the neglect of the trustee to keep one of the wagons in a proper state of repair an accident happened on the railway on which the wagon was travelling, who would be liable for the damage?]

That would be nothing more than a breach of the contract. It is the duty of the trustee to carry out the bankrupt's contracts if he thinks it will be beneficial to the estate to do so; but he derives no personal profit from it. That the trustee should be subject to a limited liability like that of an executor in respect of his testator's contracts, would be a complete novelty in bankruptcy. If the act had intended to make such a provision, it would have been made expressly, not left to be implied. All the cases which have been referred to proceed upon this principle, that the object of the act was to extend the release of the bankrupt, and at the same time to extend equally the right of proof against his estate. Sect. 49 releases the bankrupt from all debts and liabilities provable in the bankruptcy. If the debt or liability is not provable, then the bankrupt is not released from it. The observations of Lord Justice Mellish in *Ex parte Llynvi Coal Company* (1) show that there is a right of proof in the present case.

**Benjamin*, in reply: The argument is that we [471 have a right to prove against the bankrupt's estate for a breach committed, not by the bankrupt, but by the trustees.

[JAMES, L.J.: That it is in truth a breach committed by the bankrupt.]

Suppose the trustee carried on the business of a bankrupt for years, and retained the services of his manager, would not the manager be entitled to be paid his salary in full out of the assets? Provable debts are debts due at the date of the adjudication, or debts which become due afterwards in respect of contracts pending at that time. In respect of contracts which the trustee is entitled to disclaim, a right of proof is given by sect. 23; what was the necessity for that provision if there is a right of proof in any event? The trustee may now continue the bankrupt's business with a view to its beneficial winding-up; formerly the assignee could not do this without the assent of all the creditors. The condition of the bankrupt is fixed at the date of the adjudication. The creditors have the twenty-eight days to elect whether the contract shall be determined or not; if the trustee does not disclaim, he adopts.

(1) Law Rep., 7 Ch., 33, 34.

[BAGGALLAY, J.A.: May not the result be that, if the trustee does not disclaim, the old law is left unaltered?]

I contend that if the contract continues, it continues with mutuality.

[MELLISH, L.J.: The parties might have made the contract determinable in the event of bankruptcy.]

The observations of Rolfe, B., in *Gibson* v. *Carruthers* (1) are in our favor.

JAMES, L.J.: I am of opinion that the judgment of the Chief Judge, affirming the judgment of the county court judge, ought to be affirmed. No doubt there is great force in the argument which Mr. Benjamin has addressed to us, 472] and possibly the Legislature *may be induced, upon consideration of many of the topics upon which he has dwelt, to alter the language of these sections of the act. The state of the law before the act of 1869 was certainly such that no claim like that which is now made by the appellants could have been effectually asserted. Up to the time of the passing of the act of 1869 assignees in bankruptcy could have gone on performing such a contract as this as long as they were minded to do so, and when they were no longer minded to perform the duty imposed by it, they might have discontinued it, and thereupon the bankrupt himself would have been liable. The performance of the bankrupt's contract by the assignee for a limited period did not relieve the bankrupt from his obligation, and the other contracting party, so long as the contract was fulfilled according to its terms, could not be heard to say that he would put an end to it. That was the state of the law at that time. Then, by the act of 1869, the law was altered to a very considerable extent, so as to free the bankrupt from liability in respect of future breaches of contract, and to give the persons whose contracts were broken or put in jeopardy by reason of the bankruptcy a right to prove against the bankrupt's estate, instead of the personal liability of the bankrupt. Alterations have been introduced for that purpose, and the main provisions with which we have to deal are contained in sect. 23. [His Lordship read the section.] Mr. Benjamin was obliged to admit that in order to give effect to his argument he must contend that the true interpretation of this section is this—that we must, from the provision that upon the execution of the disclaimer by the trustee the contract is to be deemed to be determined from the date of the order of adjudication, imply that, if the contract is not disclaimed after notice from the other

(1) 8 M. & W., 329.

party, then it is to be deemed to have been adopted by the trustee upon the responsibility and at the expense of the estate. That is a provision which might perhaps be very properly made by the Legislature; but, to my mind, to insert it in this way by implication would not be to construe the act of Parliament, but to alter it; it might be to improve it, according to the view which some persons take of the matter, but it would certainly be altering the act of Parliament, and enlarging still further the provisions which the Legislature has thought fit to make with respect to such contracts. All we can *say is that, except to the [473 extent mentioned in the act of Parliament, the law remains exactly as it was before; that is to say, that if the contract is not disclaimed by the trustee it is not determined. The result of that would be to leave the bankrupt liable for any future breaches; but that contingency seems to be provided for by sect. 31, which says in effect that, where there is a breach during the continuance of a bankruptcy of any contract which was made by the bankrupt before the bankruptcy, proof for the damage may be made exactly as if the breach had taken place before the bankruptcy. I am of opinion, therefore, that, having regard to sect. 31 as well as to sects. 23 and 24, the remedy of the appellants is that which the Chief Judge and the County Court Judge have given them—that they have a right to prove in the liquidation in respect of the breach of contract, just as if the breach had occurred before the liquidation. And, as to sub-sect. 2 of section 25, that does not seem to me to carry Mr. Benjamin's argument to the extent which he wished. That does not give the trustee the power to carry on any contracts of the bankrupt, whatever may be their nature, for any time, but only to carry on the business of the bankrupt so far as may be necessary for the beneficial winding up of the same. That is only a temporary provision until the trustee can dispose of the good-will. It does not appear to me that we can extend that clause so as to mean that the trustee may take upon himself the obligations of a contract which might last for seven or fourteen years.

MELLISH, L.J.: I am of the same opinion. I think that when the law as it existed prior to the passing of the act of 1869 is really understood there will not be much difficulty in understanding what is the effect of the act of 1869. It had been settled before that act that the mere fact of one of two parties to a contract becoming bankrupt did not of itself put an end to the contract. No doubt the person who had contracted with the bankrupt was not bound to deliver

goods to a man who had become insolvent unless he got paid for them beforehand, and a man who had agreed to do work and labor for a bankrupt—a foreman, for instance, who had been engaged for three years—was not bound to go on serv-
474] ing him *without the prospect of getting paid. He would be entitled to say, "I cannot go on unless I am secured my wages." But, subject to that, the bankrupt's contract continued, and the assignee was always entitled to perform it, and so long as he performed it he got the entire benefit of it, but he might at any time stop. He might either not take up the contract at all, or he might take it up for a time, and then afterwards, if he found that it was not a beneficial contract, he might abandon it, and the other party had no remedy except to bring an action against the bankrupt personally to recover damages for the breach. That, no doubt, was a hard state of things, both on the person who had contracted with the bankrupt and on the bankrupt himself. Now, the question is, to what extent has that law been altered? and beyond all question, as we have already laid down in several cases, it has been altered to this extent: No action can any longer be brought against a bankrupt himself for breach of contract subsequent to the bankruptcy. But then we must see how the statute has dealt with such a case. The 23d and 24th sections really deal only with the power given to the trustee to disclaim a contract, and with what is to be the effect if he elects to disclaim a contract. If the trustee elects to disclaim a contract, then the contract is to be deemed to have been determined from the date of the order of adjudication, and the person who had entered into the contract with the bankrupt is to have a right to prove against the estate upon the footing that the contract was put an end to at that time. He is entitled to prove for the amount of damages he has sustained by losing the contract as from that period. Neither the 23d nor the 24th section, however, enacts anything as to what is to be the effect if the trustee does not disclaim. The 24th section, no doubt, says that if he does not disclaim within twenty-eight days after notice he cannot disclaim the contract at all, and if he cannot disclaim it the contract has not become rescinded as from the date of the order of adjudication. But then, what takes place if the trustee goes on with the contract for a time and then abandons it? What is to be the result of that? Really, the only words on which the appellants can rely are those in the 2d sub-section of the 25th section, that "subject to the provisions of this act the trustee shall have power to carry on the business of the

bankrupt *as far as may be necessary for the bene- [475
ficial winding up of the same." Are those words sufficient to make the trustee personally liable for any damages the other party to the contract may have sustained by reason of the trustee throwing up a contract of the bankrupt after he had carried it on for a time, and after he had neglected to disclaim it, or are they sufficient to make the trustee liable to pay out of the estate the full amount of the damages occasioned by the breach? In my opinion those words are wholly insufficient for that purpose. They merely say that the trustee "may" carry on the business as far as is necessary for the purpose of a beneficial winding-up, and they do not, in my opinion, give the trustee any greater power than assignees in bankruptcy had previously to the passing of this act. The words do not give the trustee power to enter into any new business, but only power to carry on the existing business so far as may be necessary for the beneficial winding-up. If there is any beneficial contract existing he may carry it out, but, in my opinion, that is not sufficient so to change the law as to make the trustee liable, either personally or out of the assets, to pay damages if the contract is subsequently broken. Then, if the statute had stopped there, the law would have remained just as it was. The bankrupt would have been liable to have an action brought against him on account of a breach of contract occasioned by the trustee having carried on a contract for a time and then having abandoned it. But the 31st section comes in and in express terms gives a right to prove for damages sustained by reason of a breach during the continuance of the bankruptcy of a contract made prior to the adjudication. That shows that there is a right to prove. At one period of the argument I thought the effect of the decision of the court below was this, that it made no difference between a case where there was a disclaimer and a case where there was no disclaimer by the trustee. But upon consideration I think that there is a clear distinction. Where there is a disclaimer the contract is to be determined as from the date of the order of adjudication. Where there is no disclaimer the contract continues in force until it is broken. Indeed, properly speaking, it is never put an end to at all, but it is broken, and the question then arises, what are the damages occasioned by reason of its being broken at the time when it is broken? Those *damages might un- [476
der some circumstances be large, but they would be quite different from the damages which would be sustained by reason of the contract being rescinded at the date of the

order of adjudication. I am of opinion, therefore, that the decision of the Chief Judge is quite right, there being no words in the act which make the trustees, either personally or in their representative character, liable for the breach of contract. The only remedy of the appellants is to prove under the 31st section for the damages which they have sustained.

BAGGALLAY, J.A.: I am of the same opinion. I was for some time much impressed by Mr. Benjamin's argument, and was disposed to think that, as the trustees did not when called upon disclaim the contracts, they ought to be treated as having adopted them on behalf of the estate. But, upon a more mature consideration of the provisions of the act, I think that it has not altered; and was not intended to alter, the state of the law affecting a bankrupt's contract, unless the trustee has disclaimed. There is first a general power given to the trustee to disclaim contracts, but then there is a subsequent provision that that power shall not be exercised after the expiration of twenty-eight days from the time when the trustee has been called upon to decide whether he will disclaim or not. It has been argued that a power to adopt contracts is conferred on the trustee by sub-sect. 7 of the 83d section of the act, but I think that the contracts there referred to are contracts to be entered into after the commencement of the bankruptcy, and that it has no reference whatever to contracts existing at the date of the bankruptcy.

JAMES, L.J.: The appeal will be dismissed with costs.

Solicitors for appellants: *Ingledew, Ince & Greening*, agents for Ingledew, Ince & Vachell, Cardiff.

Solicitors for trustee: *Vizard, Crowder & Co.*, agents for Daltons, Spencer & Corbett, Cardiff.

[3 Chancery Division, 477.]

C.A., July 27, 1876.

477] **In re* ENTWISTLE. *Ex parte* ARBUTHNOT.

Bills of Exchange drawn against Goods—Specific Appropriation of Proceeds of Sale—Vendor and Purchaser—Bankruptcy of Purchaser.

Bills of exchange were drawn by the vendor and shipper of goods upon the purchaser for the invoice prices of the goods, with a direction to place the same to account of the shipments. On the acceptance of the bills by the purchaser the bills of

lading were handed over to him. The bills of exchange were dishonored at maturity, and the purchaser became bankrupt:

Held, that there was no specific appropriation of the proceeds of sale of the goods to meet the bills of exchange.

Frith v. *Forbes*(1) explained.

THIS was an appeal from a decision of Mr. Registrar Brougham, sitting as Chief Judge in Bankruptcy.

John Entwistle, a merchant in London, filed a liquidation petition on the 2d of November, 1875, under which, on the 17th of November, E. Waterhouse was appointed trustee.

Messrs. Arbuthnot, Ewart & Co. were merchants in London. They also carried on business in Bombay under the firm of Ewart, Latham & Co. The same persons were partners in the London and the Bombay firms. In May and June, 1875, Entwistle had made several purchases of cotton of Arbuthnot, Ewart & Co. The orders were given by him, in the first instance, to the London firm, and were by them transmitted to the Bombay firm. Entwistle also wrote to the Bombay firm confirming the orders, and letters, and telegrams on the subject passed between him and both the firms. For the purpose of paying for the cotton, bills of exchange were drawn by the Bombay firm upon Entwistle, and were forwarded by them to the London firm, who presented the bills to him for his acceptance. The bills of lading were not attached to the bills of exchange, but were forwarded by the Bombay firm to the London firm, for them to hand over to Entwistle in exchange for his acceptance of the bills of exchange. In some cases the bills of lading were not sent to England by the same mail as the *bills of exchange, but by a later mail, but in all [478 cases Entwistle accepted the bills of exchange when they were presented to him for the purpose, and the bills of lading were handed over to him when he had done so, or as soon after as they arrived in London.

One of the bills of exchange (the others were in a similar form) was as follows:

"No. M. 273. £3,000. Bombay, 1st June, 1875.

"Three months after sight pay this first of exchange (second and third of same tenor and date not paid) to the Chartered Mercantile Bank of India, London, and China, or order, the sum of three thousand pounds sterling for value received, and place the same to account cotton shipments as advised, with or without further advice.

(Signed) "Ewart, Latham & Co.

"To John Entwistle, Esq., London.

"Payable in London."

(1) 4 D. F. & J., 409.

On the 28th of June, 1875, Arbuthnot, Ewart & Co. wrote a letter to Entwistle, in which they informed him of the drawing of the bill for £3,000, and mentioned that the bill of lading of 400 bales of cotton, in respect of which it had been drawn, had not arrived, and added, "We shall feel greatly obliged, therefore, by your kindly accepting our firm's drafts for our account against our handing you the documents on receipt by the next mail, which we hereby agree to do."

In a letter dated the 11th of June, 1875, written by the Bombay firm to Entwistle, after stating that they had not been able to send the bill of lading of the 400 bales of cotton by that mail, they added, "We trust the draft against the shipment met due honor notwithstanding."

On the 2d of July Entwistle wrote a letter to the Bombay firm, in which he said, "I have accordingly accepted your draft for £3,000 on account of the shipment, as advised."

When Entwistle received the bills of lading of the various shipments of cotton he indorsed them to Chambers, Holden & Co., brokers at Liverpool, who made him advances of 479] money upon the *security of the cotton, of which, when it arrived at Liverpool, they obtained possession, and afterwards sold it, accounting for the proceeds.

Entwistle stopped payment on the 15th of September, 1875. The bills which he had accepted for the cotton were then about to become due, and they were taken up on the 18th and 20th of September by Arbuthnot, Ewart & Co., for the honor of their Bombay firm. The total amount of the bills was equal to the total amount of the invoice prices of the shipments of cotton.

Arbuthnot, Ewart & Co. were in no way privy to the course of dealing between Entwistle and Chambers, Holden & Co. When Entwistle stopped payment, Chambers, Holden & Co. were creditors of his to a large amount, and they held all the cotton which had been purchased by him from Arbuthnot, Ewart & Co. On the 27th of September, before Chambers, Holden & Co. had sold any part of it, Arbuthnot, Ewart & Co. gave them notice that they claimed the proceeds of the cotton, as having been specifically appropriated to the payment of the bills of exchange, and required them not to part with the proceeds. They gave a similar notice to Entwistle. After this Chambers, Holden & Co. sold the cotton and received the proceeds of sale, and on a settlement of their account with Entwistle there was a balance of £1,595 due from them to him. It was arranged that this sum should be paid to Entwistle's trustee without prejudice to the claim

of Arbuthnot, Ewart & Co., and application was made to the court to determine the rights of the parties. The Registrar decided that there had been no specific appropriation, and that the trustee was entitled to the money. Arbuthnot, Ewart & Co. appealed.

W. Latham, for the appellants, relied upon *Frith* v. *Forbes* (1) as showing that there had been a specific appropriation of the cotton to meet the bills of exchange.

Horton Smith, for the trustee, was not called upon.

*JAMES, L.J.: The case of *Frith* v. *Forbes* (1) must [480 not be misunderstood. The court there held, that in a transaction between principal and agent a direction given by the principal to the agent as to the application of the proceeds of the sale of particular goods was binding on the agent, and that he could not set up against it his own general lien. But that decision has nothing whatever to do with a transaction between vendor and purchaser. In the present case the goods became the absolute property of the purchaser. As soon as he received the bills of lading he had a right to do anything he pleased with them. There is no ground whatever for the appeal, and it must be dismissed with costs.

MELLISH, L.J.: I am of the same opinion.

BAGGALLAY, J.A.: In *Robey & Co.'s Perseverance Ironworks* v. *Ollier* (2) *Frith* v. *Forbes* was commented upon, and the Lord Justice James then said that the decision in that case depended upon special circumstances, and could not be treated as governing any other case.

Solicitors for appellants: *Freshfields & Williams.*
Solicitors for trustee: *Johnson, Uptons & Budd.*

(1) 4 D. F. & J., 409. (2) Law Rep., 7 Ch., 695.

[3 Chancery Division, 502.]

V.C.B., April 26: C.A., July, 18, 1876.

*BARING v. STANTON. [502

[1872 B. 149.]

Agent—Insurance—Commission—Discount.

A shipowner had for several years had an account with merchants who effected for him insurances on his ships. In their accounts they charged him with the full premiums, but they had been allowed by the underwriters, and retained out of the premiums 5 per cent. brokerage and a further 10 per cent. discount for ready money, as usual on insurances. On taking the accounts in a suit respecting a mortgage on some ships the shipowner objected to allow the merchants to retain the 10 per cent.:

Held, that as these allowances were usual, and as the shipowner had never inquired on what terms the merchants effected the insurances, and appeared to have accepted their terms, he could not now raise the objection.

Order of Bacon, V.C., affirmed.

THE plaintiffs in this case were Messrs. Baring Brothers & Co., merchants in London, and the defendant, George Stanton, was an American shipowner who had for some years been in business in London. From 1861 to 1872 Stanton had had an account current with Messrs. Baring. He was in 1872 indebted to them in about £22,000, and the ships Stockbridge, Hoogly, Trowbridge and Kingsbridge were mortgaged to them. An arrangement was, as they alleged, then made by which they became absolute owners of the Trowbridge and the Kingsbridge. In May, 1872, Messrs. Baring filed a bill against Stanton to have a fresh mortgage of the Stockbridge and the Hoogly, on the footing that the Trowbridge and the Kingsbridge belonged to them absolutely. Stanton filed a cross bill against Messrs. Baring to have it declared that they were only mortgagees of the Trowbridge and the Kingsbridge. A decree was made in *Baring* v. *Stanton* for a mortgage as prayed by the bill, and accounts were directed. Messrs. Baring had insured ships for Stanton, and in their accounts they claimed as against him the full amount of premiums as paid by them, with interest thereon at 5 per cent., without deducting from the amount so charged, and in fact claiming to retain, 5 per cent. commission or brokerage allowed to them by the insurance offices on the premiums, and 10 per cent. discount for ready money also allowed by the insurance offices.

503] *Messrs. Baring made affidavits and produced other evidence that it was a matter of course to debit the customer, on the day on which the premium for insurance was fixed, with the full amount, and to retain the 5 per cent. brokerage and 10 per cent. discount which were always allowed by the insurance companies, and to charge the customers with 5 per cent. interest on the full amount of the premium.

Stanton deposed that for some years after he commenced business with Messrs. Baring he was resident in America, and was not aware that they were receiving these discounts and brokerage; that shortly before he filed his bill he became aware of this, and that if he had been previously aware of it he should have objected. He produced affidavits by merchants who had been in the habit of allowing to their customers these discounts and brokerage.

Stanton in Chambers submitted to allow the brokerage; but the question as to the allowance of discount was

argued before the Vice-Chancellor Bacon on an adjourned summons on the 6th of April, 1876, when the same counsel appeared and the same arguments were used as before the Court of Appeal.

BACON, V.C., said that he considered this case settled by the decision in *Great Western Insurance Company* v. *Cunliffe* (1). The view which his Lordship had taken of that case was not concurred in by the Lords Justices, and in delivering their judgments they had decided certain points in the most explicit manner, so that it would be impossible for his Lordship to adhere to his former opinion. Whether the money was actually paid made no difference whatever. If between the underwriter and the broker, the only persons concerned, credit was given and taken, that was equivalent to payment, and the matter could not be further inquired into. Though the evidence might not prove a general custom, there was clear evidence that Messrs. Baring had always carried on their business in that way. The custom was not unreasonable, and his Lordship was bound to treat this as a case decided by the Court of Appeal.

*The defendant Stanton appealed, and the appeal [504 came on for hearing on the 18th of July, 1876.

Kay, Q.C., and *Caldecott*, for the appellant: This is quite different from *Great Western Insurance Company* v. *Cunliffe* (1), as here the agents take 5 per cent. brokerage for their labor, and thus have been remunerated. As agents, their accounts ought to have shown to their principal all allowances; but nothing of the kind appeared, and the defendant says that he was not aware of it. An agent is bound to tell his principal everything, without any inquiry by the principal. The plaintiffs have entirely failed in showing a general custom of which every one, still less a stranger to this country, must be taken to be aware. *Turnbull* v. *Garden* (2) and *Queen of Spain* v. *Parr* (3) are decisive against these charges. There are two systems of allowance; in one system there is a current account between the broker and the underwriter, and if at the end of the year the underwriter has made a profit on all his dealings with the broker, he allows the broker 12 per cent. on that profit, which was the case in *Great Western Insurance Company* v. *Cunliffe*, and was a main ground for that decision. Here the other system was adopted. The premiums were paid in ready money, and a 10 per cent. discount was allowed on each transaction, and ought to have been allowed to the customer. The cus-

(1) Law Rep., 9 Ch., 525; 10 Eng. R., 561. (2) 38 L. J. (Ch.), 331.
(3) 39 L. J. (Ch.), 73.

tom seems to have been recognized as long ago as in *Power* v. *Butcher* (1), but it is not universal, and the agent must show either universal custom or a particular contract.

Cotton, Q.C., and *J. Kaye*, for the plaintiffs, were not called upon.

JAMES, L.J.: I am of opinion that the order of the Vice-Chancellor in this case ought to be affirmed.

The question is whether this case is governed by the de-
505] cisions *made by me, as Vice-Chancellor, in *Queen of Spain* v. *Parr* (2) and in *Turnbull* v. *Garden* (3), or by the case of *Great Western Insurance Company* v. *Cunliffe* (4). It appears to me that that last case really governs this. In that case the Lord Justice Mellish observed (5): "Then it is quite obvious that they must have known, and they do not deny that they did know, that Messrs Pickersgill were to be remunerated by receiving a certain allowance or discount from the underwriters with whom they made the bargains. It was easy to ascertain by inquiry what was the usual and ordinary charge which agents who effect reinsurances are entitled to make. If a person employs another, who he knows carries on a large business, to do certain work for him as his agent with other persons, and does not choose to ask him what his charge will be, and in fact knows that he is to be remunerated not by him but by the other persons—which is very common in mercantile business—and does not choose to take the trouble of inquiring what the amount is, he must allow the ordinary amount which agents are in the habit of charging." That really seems to me to govern this case. It is quite clear that it was known to everybody connected with insurances that the insurance offices were in the habit of making allowances, by way of brokerage and otherwise, of 12 per cent. of the profits, or 10 per cent. discount, and also 5 per cent. brokerage; so much so, that some of the documents produced actually contain the thing printed as common form. It is quite obvious that this is a recognized practice of the offices. That being so, it is very difficult to believe that Mr. Stanton must not have known that Messrs. Baring were receiving from the offices such allowances as the offices were in the habit of making. Their dealings go on for years. Mr. Stanton never takes the trouble to make inquiries, but settles all the accounts, and deals with Messrs. Baring on that footing; and it is not unimportant in this case to observe that when he filed a bill—it

(1) 10 B. & C., 329.
(2) 39 L. J. (Ch.), 73.
(3) 38 L. J. (Ch.), 331.
(4) Law Rep., 9 Ch., 525; 10 Eng. R., 561.
(5) Law Rep., 9 Ch., 539.

is true for another object, to have a declaration that the conveyance of the ships was by way of mortgage only—and asked that upon the footing of that mortgage the accounts might be taken, he actually referred to the accounts which would have to be taken, and accepted the course of business between *the two firms including the very thing which [506 is now the subject of this discussion. [His Lordship then read some of the statements.] After that, as between himself and Messrs. Baring, it seems impossible to allow him to reopen an account which has gone on from the year 1861 to the year 1872. I am of opinion, therefore, that the order of the Vice-Chancellor ought to be affirmed, and this appeal dismissed with costs.

MELLISH, L.J.: I am of the same opinion. I think that this case cannot in principle be distinguished from the case of *Great Western Insurance Company* v. *Cunliffe* (1). It appears that there are two ordinary modes in which agents employ underwriters—the cash system and the credit system. According to the credit system the accounts are made out at the end of the year; all the premiums which the particular merchant or agent has brought to the underwriter are put on one side, and all the losses are put on the other side, and then, if there is a profit, the underwriter allows the merchant 12 per cent. on that profit. We held that the merchant who brought the business was entitled to keep that profit. The cash system adopted in this case is this: Some underwriters, particularly new insurance companies, object to a long credit system, and prefer a system by which they get their premiums paid at once. They are willing to make a sacrifice for the purpose of obtaining prompt payment, and on payment, instead of the 12 per cent. on the net profits, if the premium is paid within a fixed number of days after the insurance is effected, they make an allowance of 10 per cent., the customers being charged with the premiums just as before. If that is generally known and acquiesced in, I cannot conceive that it is a fraud upon anybody. It may be a misfortune to Mr. Stanton, that being an American, he really did not know the usage in London. But if a person comes and trades in London, he must make himself acquainted with the usages in London, and when he employs the Messrs. Baring he must expect the Messrs. Baring to treat him in the same way as they treat all their other customers, and he cannot be entitled because, after ten years' business transactions with them, he quarrels with them, to say that they should treat him in a different way

(1) Law Rep., 9 Ch., 525; 10 Eng. R., 561.

507] from that in which they treat *anybody else. According to the evidence of Messrs. Baring's clerk, this is the invariable way in which they charge their customers, and if Mr. Stanton had inquired before he employed Messrs. Baring what their charges were, they would have told him that these were their charges. But he had confidence in them, and he thought that they would charge what was right whether he asked them or not, and cannot now be allowed to open the accounts. I think we do not at all overrule the case of *Turnbull* v. *Garden* (1), because, as I understand, in that case the party from whom the discount was taken was not in the position of Messrs. Baring, but was an agent for somebody else. The real brokers were willing to allow a discount, and then the question was whether the next agent could keep it in his own pocket, or was bound to give it to the principal, which was an entirely different question.

I am of opinion, therefore, that the judgment of the Vice-Chancellor in this case ought to be affirmed.

BAGGALLAY, J.A.: I am of opinion that this case is entirely governed by the decision in *Great Western Insurance Company* v. *Cunliffe* (2), and that there is nothing whatever in that case which was antagonistic to the principle established in the cases of *Turnbull* v. *Garden* and *Queen of Spain* v. *Parr* (3). It appears to me that, exactly as in *Great Western Insurance Company* v. *Cunliffe*, Messrs. Pickersgill were employed, in this case Messrs. Baring were employed, to do a particular business, namely, that of insuring, and they were making certain profits, incidental to the carrying on of that business. That certainly appears to have been the view of the case which was taken by Mr. Stanton when he filed his bill against Messrs. Baring, the statements in which bill he verifies by affidavit, in a form which implies that that was the ordinary and usual course of business, and that he had been aware of it throughout.

Solicitors for plaintiffs: *Markby, Tarry & Stewart.*
Solicitors for defendant: *Shum, Crossman & Crossman.*

(1) 38 L. J. (Ch.), 331.
(2) Law Rep., 9 Ch., 525; 10 Eng. R. 561.
(3) 39 L. J. (Ch.), 73.

[3 Chancery Division, 508.]

C.A., July 29; Aug. 2, 1876.

*Fox v. Buckley. [508

Breach of Trust—Devise—Trustee—Legal Estate.

A testator devised certain real estate for life to one of his executors and trustees: the devisee afterwards committed breaches of trust and then filed a petition for liquidation:

Held (affirming the decision of the Vice-Chancellor of the Palatine Court), that, as against the trustee in the liquidation, the life estate of the executor and trustee being legal, could not be taken and applied in replacing losses occasioned by the breaches of trust.

Edmund Buckley, of Manchester, by his will, dated the 9th day of December, 1856, after making sundry dispositions of real and personal estate, gave and devised all the freehold lands and hereditaments not thereinbefore specifically devised of which he was competent to dispose unto his executors, Sir Edmund Buckley (therein called Edmund Peck), W. Mallalieu, T. B. Jervis, and J. N. Lees, their heirs and assigns, to the use of Sir Edmund Buckley and his assigns during his life without impeachment of waste, with divers remainders over. The testator made several codicils relating to a sum of £20,000 and appointing G. H. Rushton executor instead of J. N. Lees, and died in January, 1867. His will was proved by Sir Edmund Buckley, W. Mallalieu, T. B. Jervis, and G. H. Rushton, who possessed themselves of the personal estate to a large amount, but failed to provide for certain legacies and annuities given by the will of the testator. The other executors permitted the whole control of the estate to fall into the hands of Sir E. Buckley, and were dead. Sir E. Buckley had, in pursuance of powers of sale, sold divers parts of the real estate devised in trust, and had with part of the proceeds bought other real estate, but had applied other part to his own personal use. In March, 1876, C. B. Smith was by Sir E. Buckley appointed trustee of the will.

On the 19th of May, 1876, Sir E. Buckley filed his petition for liquidation by arrangement in the County Court of Lancashire, and J. Halliday was duly appointed trustee of his estate and effects.

*The plaintiffs, who were entitled to the legacy of [509 £20,000, and to other benefits under the will, filed a bill in the Chancery of the County Palatine of Lancaster against Sir E. Buckley, C. B. Smith, the executors of the deceased executors, and the trustee of the liquidation, stating as above

mentioned, and that Sir E. Buckley had deliberately violated the trusts and directions contained in the will and codicils, and praying for administration of the testator's estate, and for accounts and a receiver.

A motion for a receiver was made in the suit before Little, Vice-Chancellor of the County Palatine of Lancaster, and the plaintiffs sought to make the order extend to the estates legally devised to Sir Edmund Buckley for life. This was opposed by the trustee under the liquidation, and the Vice-Chancellor refused to make the order extend to the estates of which Sir E. Buckley was legal tenant for life (1).

(1) 1876. July 11.

LITTLE, V.C., said that it was not disputed that Sir E. Buckley, in his character of executor and trustee, had committed breaches of trust, and that his beneficial interest in the trust property was liable to be applied towards the making good of his breaches of trust. The only question was, whether the property legally devised to him was subject to the same liability.

The question was materially different from that which had often been before the Court of Chancery as to the right to impound or stop the beneficial interest of a defaulting trustee in order to make good a breach of trust committed by him. In those cases there was something to be done in the administration of the trusts or of the assets, and the court took that occasion to oblige any claimant upon the estate to satisfy his obligations before he was allowed to withdraw anything from it. But a legal devisee took instanter on the testator's death, and if the devisee was indebted to the testator the debt could not be treated as forming a lien on the devise: *Ex parte Barff* (De G., 613); and it seemed somewhat singular that if a debt due to the testator himself did not constitute a lien on the estate, a debt accruing to the testator's estate after his death should constitute a lien. No doubt the testator might so frame his will as to make the devised estate liable, but there was nothing of that kind in this will.

The argument was that the devise to Sir E. Buckley and his appointment as trustee having been made by the same instrument, the devise must be taken subject to the condition that the devisee would duly perform the duties of executor and trustee. If a legacy was annexed to the office, then the condition arose, because it was so expressed in the will; but if the gift was independent of the office, the office might be disclaimed, and the legacy might be accepted. It could not be contended that the legal devise was in any way connected with the office of executor or trustee, and the mere circumstance of the devisee afterwards incurring a debt to the estate could not qualify his devised estate.

The cases of *Waring* v. *Coventry* (2 My. & K. 406) and *Coote* v. *O'Reilly* (1 J. & Lat. 455) had been referred to as cases in which liens on real estate were set up in order to make good breaches of trust by the devisee. But both cases could be referred to the doctrine that the tenant for life of an incumbered estate is bound to keep down the charges. The principal case relied on, however, was *Woodyatt* v. *Gresley* (8 Sim. 180). There, no doubt, the Vice-Chancellor held that liability for breach of trust existed, but he put it entirely upon the law of contract; and it had been here contended that some such doctrine was to be here imputed, and that Sir E. Buckley's trustee could not approbate and reprobate, that is, take under an instrument and not perform the terms of the trust. But there was no necessary connection between the devise and the trust, and a liability such as was held to exist in *Woodyatt* v. *Gresley* could not be inferred from a subsequent transaction.

There was no authority for it, and *Egbert* v. *Butter* (21 Beav. 560) was an express authority the other way, which must be followed.

His honor, however, regretted to be obliged to arrive at that conclusion, and would not be sorry if a different con-

*The plaintiff appealed. [510

Ince, Q.C., and *Eoeritt*, for the appellants: The court will intercept the interest of a defaulting trustee. There is no doubt that this principle applies when his estate is equitable, and there is no reason why it should not apply when the estate is legal. He takes the benefit and must take the onus: *Priddy* v. *Rose* (1). In *Woodyatt* v. *Gresley* (2) a legal estate was impounded. *Waring* v. *Coventry* (3) and *Coote* v. *O'Reilly* (4) apply. No doubt *Egbert* v. *Butter* (5) is against us, but is not binding on this court. *Ex parte Barff* (6) and *Jacubs* v. *Rylance* (7) show what the principle is. In *Hurst* v. *Hurst* (8) it was held that there was no difference when the estate is legal. He takes this estate with the trust annexed, and a man cannot sell part of an estate in breach of trust and keep the rest. The trustee in liquidation is not an assignee for valuable consideration, and can only take through the debtor.

Robinson, Q.C., *Stallard*, *E. S. Ford* and *Bardswell*, for the other parties, were not called upon.

*James, L.J.: In my opinion the order of the Vice- [511 Chancellor of the County Palatine of Lancaster was the only order he could have made in this case. It is said that there is a conflict of authority, but there seems to be no authority whatever on the side of the appellant, whilst *Egbert* v. *Butter* (5) seems to be an authority against him on the very point.

The other cases cited have no value whatever. *Woodyatt* v. *Gresley* (2) was entirely a matter of contract. The nearest case is *Ex parte Barff* (6), where there was a legal devise to a person who was indebted to the testator, and there the Vice-Chancellor Knight Bruce held that he had no power to charge the estate with the debt. The estate of a legal devisee is under no circumstances under the control of the court. Sir E. Buckley was in no way a trustee of this estate; he might have sold it at any time, and it cannot be held that because he afterwards became indebted to the trust, a charge was thereby imposed on the estate. No doubt it is a hard case upon the family, but there are other persons interested, and the contest is in fact between two creditors. The appeal must be dismissed with costs.

clusion should be elsewhere arrived at. But according to the authorities, the receivership could not extend to the legal estates.

(1) 3 Mer., 86, 104.
(2) 8 Sim., 180.
(3) 2 My. & K., 406.
(4) 1 J. & Lat., 455.
(5) 21 Beav., 560.
(6) De G., 613.
(7) Law Rep., 17 Eq., 841.
(8) Law Rep., 9 Ch., 762.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors for appellants: *Emmet & Son*, agents for A. & G. W. Fox, Manchester.

Solicitors for respondents: *Phelps & Sidgwick.*

[3 Chancery Division, 518.]

M.R., Feb. 7, 1876.

518] *KING v. FOXWELL.

[1874 K. 37.]

Domicile—Acquired Domicile—Naturalization—Abandonment of acquired Domicile—Reverter of Domicile of Origin.

In order to change his domicile of origin, a man must voluntarily fix his sole or principal residence in a country which is not his country of origin, with the intention of residing there for a period not limited as to time.

The domicile so acquired may be put an end to simply by abondoning it, without acquiring a new domicile of choice, and in such a case the domicile of origin reverts.

CHARLES KING, the testator in this cause, was a native of England, and married his first wife there. He emigrated to North America in or about 1851, and settled at Syracuse, in the state of New York, in the United States, where he carried on business as a boot and shoe maker. His wife, whom he had left in England, joined him at Syracuse, and lived with her husband there down to 1863, when she died.

In 1854 Charles King filed in the proper court of the state of New York a declaration of his intention to become a citizen of the United States, and renounce his allegiance to Great Britain; and in September, 1856, he was, by a rule entered in the minutes of the court, duly admitted as a citizen of the United States. A certified copy of this rule was preserved by Charles King up to the time of his death.

In September, 1866, Charles King married his second wife, the plaintiff in the cause, who was a widow then residing in Syracuse.

In April, 1867, Charles King returned to England, accompanied by the plaintiff. He had previously (but at what exact date did not appear) sold his business and closed his banking account at Syracuse.

Towards the end of 1867 Charles King had a quarrel with the plaintiff, who left him and went back to America. After she left, Charles King became ill, and went to live with one
519] of his *sisters, and resided with her until July, 1869, when the plaintiff returned to England. Charles King, soon after he learned that the plaintiff had returned, left his sister's house and travelled about, with the view of secret-

ing himself from the plaintiff, who was unable to find him, and returned to America in January, 1870. Charles King continued to travel about England, and in January, 1871, went to Shepton Mallet, his birth-place, where he made a will, by which he gave two small pecuniary legacies and disposed of the bulk of his property in favor of trustees for charitable purposes. He afterwards went to Jersey for the benefit of his health, and died suddenly in lodgings at St. Helens on the 24th of November, 1871.

The will of the testator having been proved in England, a bill was filed by the plaintiff, alleging that the testator was at the time of his death domiciled in the state of New York; that by the laws in force there the charitable dispositions contained in the will were void; and that the residue of the testator's personal estate was divisible between the plaintiff and the next of kin of the testator living at his death; and praying for relief on that footing. The cause now came on to be heard, and the following questions were argued and decided separately: 1, whether the testator ever acquired a domicile in New York; 2, if so, whether he continued to be domiciled there up to the time of his death.

Chitty, Q.C., and *Bevir*, for the plaintiff: Before the Alien Act, 1870, it was impossible for a British subject to renounce his allegiance; but that has now been changed, and as the act is retrospective (see sect. 6) it must be held that Charles King effectually became an American subject; he has done what has been held to be necessary in these cases to effect a change of domicile, viz., *exuere patriam: Moorhouse* v. *Lord* (1); *Udny* v. *Udny* (2); *Douglas* v. *Douglas* (3); *Haldane* v. *Eckford* (4). Besides, all the facts of the case show that down to 1863 he had the intention of permanently residing in America; he did actually reside there, and consequently he acquired an American domicile.

**Fischer*, Q.C., and *Whitaker*, for the executors: It [520 is true that Charles King resided for fifteen years in America, but he never had any intention of permanently residing there, and under these circumstances the length of residence is immaterial: Story's Conflict of Laws (5); *Hodgson* v. *De Beauchesne* (6). The attempt which he made to change his allegiance was inoperative, and cannot be taken into account.

JESSEL, M.R.: I have no doubt the testator acquired an American domicile; that is quite independent of the question whether he ever lost it.

(1) 10 H. L. C., 272.
(2) Law Rep., 1 H. L., Sc., 441.
(3) Law Rep., 12 Eq., 617.
(4) Law Rep., 8 Eq., 631.
(5) Par. 44.
(6) 12 Moo. P. C., 285.

What is domicile? I have had before me a great number of authorities, and the conclusion I draw is this, that in order that a man may change his domicile of origin he must choose a new domicile—the word "choose" indicates that the act is voluntary on his part—he must choose a new domicile by fixing his sole or principal residence in a new country (that is, a country which is not his country of origin), with the intention of residing there for a period not limited as to time.

You must therefore show permanent residence in a new country. Neither of these is a simple fact, for I take it that all these questions of *status* involve a good deal more than can be seen by the eye. Residence is not eating, drinking and sleeping at a particular house; all these things may be done, and done for years, while a person is travelling. On the other hand, a person may have a residence and yet not visit it for a great number of years; that may be his only residence, he may have no other home. It is therefore difficult to say what residence is: but that is what the law requires. Again, what is the meaning of permanent residence? That is a question which cannot be decided by mere length of time, the answer to it must involve the consideration of the intention of the person.

That being the state of the law, did this shoemaker intend to reside permanently in the United States? There can be no question as to residence; he had a shop and house at Syracuse for fifteen years, and during those years he had no other place of abode. Then did he reside there permanently, or was the intention on his part to reside for a limited period
521] only? If you show that a man *resides in one place for a length of time, the inference is that he intends to reside there permanently, unless there is something to rebut it; and here, therefore, the testator having lived in the United States for fifteen years, must be taken to have resided there permanently unless some evidence is produced to the contrary. Not only is no evidence to the contrary produced, but all the facts point the other way. There is nothing whatever which would get rid of the presumption that he intended to reside there permanently from 1851 to 1866. It is true that in 1866 a letter is produced showing a desire on his part to return to this country; but all the facts up to that time point to permanency of residence in the United States. I am of opinion, therefore, that he acquired an American domicile.

Chitty, Q.C., and *Bevir*, then contended that he never abandoned his American domicile. The evidence showed

that he carefully preserved his certificate of naturalization up to the time of his death, and always spoke of himself as being an American subject. He never intended to abandon his American domicile; his object in remaining in England was to separate himself from his wife; he never settled permanently in England. Under these circumstances he retained his American domicile: *Douglas* v. *Douglas* (1).

Fischer, Q.C., and *Whitaker*, were not called on.

Bovill, Q.C., for the trustees under the will, took no part in the argument.

JESSEL, M.R.: The question I have now to decide is, whether the testator, having acquired an American domicile, abandoned it? Now a man having acquired a domicile of choice may abandon it, without it being incumbent on him to acquire a new domicile of choice; that is to say, he may abandon his domicile of choice without acquiring, in strictness, any new domicile; because his domicile of origin reverts. That doctrine is laid down by Lord Westbury in *Udny* v. *Udny* (2), and consequently all that has to be proved in this case is the abandonment of the American domicile; it is not incumbent on the *defendants to [522 prove the acquisition of a new domicile of choice. I think that it is established that he abandoned his American domicile. There is no dispute as to what he did or what he wrote, the only dispute is as to what he said: and what he did and what he wrote are to my mind conclusive. He sold off all his property in America, he left the country, and his letters show that he had no intention of returning. The evidence as to what he said is conflicting. I set off the statements on one side against those on the other, and upon the written evidence I come to the conclusion that he abandoned his American domicile; and the bill must, therefore be dismissed, but, under the circumstances, without costs.

Solicitors: *Ewbank & Partington; Whitakers & Woolbert*, agents for G. M. Mackay, Shepton Mallet.

(1) Law Rep., 12 Eq., 617, 648. (2) Law Rep., 1 H. L., Sc., 441.

See 15 Eng. Rep., 739 note.

The domicile of a party in any particular locality is acquired by a union of intent and presence. The defendant, a shipmaster, left his home in Stockton in September, 1871, intending to abandon Stockton as his home, and, on his return from sea, to go to Searsport and make it his home thereafter. On his return, in June, 1872, he married a resident of Searsport, remained there a few days, then went to sea with his wife, returned to Searsport in May, 1874, and left his family there, not having been in Stockton except on a visit since 1871. Held, in an action by Stockton for taxes in the years 1872–3–4, that from and after June, 1872, when there was a union of intent and of presence in Searsport, his domicile was in Searsport and not in Stockton: Stockton *v.* Staples, 66 Maine, 197;

Littlefield *v.* Brooks, 50 Maine, 475; Parsons *v.* Bangor, 61 Maine, 457.

A party who leaves this state without any settled intention of acquiring a residence elsewhere, but only with a conditional intention of doing so, does not lose his residence here so long as that intention remains conditional.

A resident of this state left it with a view to seeking a better climate, and if he found one that suited him, and everything else was agreeable, of making it his home, but with no particular place in view. He visited Iowa, Nebraska, and Kansas, and in the latter state he took a contract to do some hauling for a railroad bridge being built. There he was taken sick, and returned to his former home in this state, never having acquired a residence or determined to make his residence at any other place than in the state of Illinois, and having been absent, in all, about seven months: Held, that he did not lose his residence in Illinois: Wilkins *v.* Marshall, 80 Ills., 74; Potts *v.* Davenport, 79 Ills., 455.

In strict legal sense, the domicile of a person is where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. Actual residence is not indispensable to retain a domicile after it is once acquired, but it is retained by the mere intention not to change it and adopt another. To effect a change of domicile there must be an actual abandonment of the first, coupled with an intention not to return to it, and there must be a new one acquired, with actual residence in another jurisdiction, coupled with the intention of making the last acquired residence a permanent home. A domicile in this state, within the meaning of the statute respecting the descent and distribution of personal property, is not lost or changed by a party residing in another state owing to domestic troubles, and by his voting in such other state when its laws authorize him to vote on a residence of six months, or by his purchasing property on speculation in such state, when there is no intention of making a final home there: Hayes *v.* Hayes, 74 Ills., 312.

A person domiciled in Missouri may spend the greater part of the year, or series of years, at another place without thereby forfeiting his domicile. He does not forfeit his domicile without an intention, definitely formed, to abandon his original domicile and take up another; and until this intention appears, either directly or by some act inconsistent with the retention of the old domicile, the presumption of the continuance of it is not overcome: Walker *v.* Walker, 1 Missouri App. Rep., 404, disapproving Hackettstown Bank *v.* Mitchell, 28 N. J. Law R., 516.

See also Guier *v.* O'Daniel, 1 Binney, 349, 1 Am. Lead. Cas. (5th ed.), 877, (733 marg. p.) and note, p. 887 (742 marg. paging); Tudor's Lead. Cases, Mercantile and Maritime Law (1st Am. ed.), 249 (marg. p.), and also titles "Capture," and "Conflict of Laws."

The domicile of the husband becomes that also of the wife upon marriage: State *v.* Ross, 76 N. C., 242, 244.

Where one domiciled in another country dies, leaving assets in this state, upon which ancillary administration is had, the administrator of the domicile cannot withdraw or dispose of the assets in this state until the ancillary administration is settled, whether there be debts in this state or not; and the assignment by the foreign administrator of a judgment recovered in this state is void: Duval *v.* Marshall, 30 Ark., 230; Sto. Confl. Laws, § 515; Clark *v.* Holt, 16 Ark., 257.

See cases cited by court and counsel in Carroll *v.* McPike, 53 Miss., 569, as to the rights and liabilities of an *ancillary* administrator.

Where an administrator is wasting the assets of an estate, any heir or creditor may apply to a Court of Chancery to have them placed in the hands of a receiver, and the estate wound up under its directions: Duval *v.* Marshall, 30 Ark., 231.

Although it has been held that a creditor at large could not file a bill to have a fraudulent transfer of personal property by the deceased in his lifetime set aside: Slocum *v.* Blackburn, 18 Ark., 309.

Otherwise as to *real* estate: Robinson *v.* Stewart, 10 N. Y., 189.

But see Estes *v.* Wilcox, 67 N. Y., 264; Allyn *v.* Thurston, 53 N. Y., 622; Ocean Nat., etc., *v.* Olcott, 46 N. Y., 12.

An assignment made by a citizen of Virginia, of personal property situated in Ohio, to assignees for the benefit of

his creditors, the assignees also being citizens of Virginia, is a contract made in and to be governed by the laws of Virginia: Wickham *v.* Dillon, Cleveland Law Record, 79, U. S. Cir. Court, Ohio, McLean, J., and Willson, D.J.; S. C., 2 Western Law Monthly, 511.

In Illinois a non-resident of the state may attach the property of another non-resident: Mitchell *v.* Shook, 72 Ills., 492.

The Mississippi administrator of a decedent, who was a citizen of Missouri, where his estate is being administered, may, under the Mississippi statute, be sued at law in the courts of that state for a debt of his intestate, though the creditor is now, and was at the time the debt was contracted, a citizen of Texas: Carroll *v.* McPike, 53 Miss., 569.

On the trial of an indictment, charging the defendant in the first count with the forgery of a bond to dissolve an attachment, and in the second count with knowingly uttering the forged bond, the government proceeded upon the ground that the defendant fraudulently presented to a master in chancery a bond to dissolve an attachment purporting to be signed by S. and J. as sureties; that at the same time he produced before the master two accomplices, who falsely represented themselves to be S. and J., and testified to their sufficiency as sureties; and that the names of S. and J. were fictitious names signed or procured to be signed by the defendant. The government also offered evidence that no such persons as S. and J. could be found. The defendant offered to show, in explanation of the absence of S. and J. as witnesses in his behalf, that the prosecuting officer had openly threatened to prosecute them for perjury, and that they thereupon fled the commonwealth and had not returned, and that he had made efforts to procure their attendance as witnesses: Held, that the exclusion of this evidence gave the defendant good ground of exception: Com. *v.* Costello, 119 Mass., 214.

As to attachment against non-resident having a place of business in the state: Wallace *v.* Castle, 68 N. Y., 370.

[3 Chancery Division, 531.]

M.R., Jan. 17, 18, 24, 25, 26, 27, 28; March 2, 1876.

*Plimpton v. Malcolmson. [531

[1875 P. 79.]

Letters Patent—Novelty—Prior Publication—Book in Patent Library—Specification—Anticipation—Sufficiency of Description, Tests of—Utility.

In 1865, letters patent for improvements in the construction of skates were granted to the agent of the alleged inventor, who was resident in America, and to whom they were afterwards assigned. Two years previously, an American work containing a brief description of the invention, and five weeks previously, a book of illustrations containing a drawing of it, were sent to the library of the Patent Office in London:

Held, that the drawing was not so published that it could be referred to on the issue of novelty.

Sufficiency of the specification and of the description relied on as an anticipation considered.

Requisite amount of utility considered.

The plaintiff, James Leonard Plimpton, was a citizen of the United States of America, who at the date of Newton's patent was residing in America, and at the time the suit was instituted, in London.

A patent, dated the 25th of August, 1865, was granted to Alfred Vincent Newton for an invention of "improvements in the construction of skates."

The invention was made and had been previously patented by Plimpton in 1863 in the United States, where he was then resident, and was afterwards repatented in the United States in 1866 in a modified form. Newton's patent was obtained on a communication from abroad, which in fact consisted in substance of a draft of the American specification and figures of 1866, which Newton adopted after introducing certain slight modifications. Newton acted merely as Plimpton's agent, and on the 10th of February, 1866, duly assigned the patent to him. The specification of Newton's patent, so far as material, was as follows:

"This invention relates to an improvement in attaching the rollers or runners to the stock or foot-stand of the skate, whereby the rollers or runners are made to turn or cant by 532] the rocking *of the stock or foot-stand, so as to assume radii of a circle and facilitate the turning of the skate on the ice or floor, and admit of the skater performing with ease gyrations or revolutions without taxing unduly the muscles of the foot or ankles."

The specification then described in detail, by reference to drawings, the mode of construction of the skate, which was in substance as follows: Two pairs of wheels or rollers were mounted on axles. Each axle worked in an axle-block, and each axle-block was connected with the skate-stock, so as to move with reference thereto about a fixed inclined axis; the axis belonging to the front axle inclining downwards and backwards from the stock, and that belonging to the rear axle inclining downwards and forwards. The description also specified certain indiarubber springs by which the action was checked. The specification then described a mode of making the skate applicable to ice by substituting flat discs called runners for the rollers. It described a mode of securing the runners by clamping them between pairs of discs, the outer one of each pair being made for ornament in the shape of a swan. The specification then proceeded as follows: "The runners, *I*, have smooth running surfaces with angular edges, so that they may be reversed when the inner edges lose their angularity by wear and a fresh sharp edge obtained, and when both edges of one surface become worn the runner may be inverted and two more angular or sharp edges obtained. Thus each runner has four angular edges, which may be successively used before the runner will require to be sharpened."

This passage in the specification (referred to hereafter as "the cited passage") was the only one which, directly or indirectly, suggested that the runners were to be set other-

wise than parallel to each other, in vertical planes. The drawings gave no cross section of the runner skate to show whether the runners were to be vertical or inclined; but the view of the skate from below given in the American specification showed a shaded oblique view of each swan, which some of the witnesses considered as an indication that the swans were to be in an inclined instead of a vertical plane. This view of the swans was omitted in Newton's figures, and lines representing a cross section substituted. There *was some difference of opinion between the [533 witnesses as to whether the lines indicating the runners in Newton's figures did not differ in thickness so as to indicate a slight inclination of the runners to the vertical. The witnesses differed, as hereinafter stated, as to the inference to be drawn in this respect, either from the figures annexed to the American specification or from the slightly modified figures annexed to Newton's specification.

Newton's specification concluded with a claim as follows: "Under the above letters patent, I claim, first, applying rollers or runners to the stock or foot-stand of a skate, as described, so that the said rollers or runners may be cramped or turned so as to cause the skate to run in a curved line either to the right or left by the turning, canting, or tilting of the stock or foot-stand. Second, the mode of securing the runners and making them reversible, as above described."

The defendant was selling roller skates having the axle-blocks movable about fixed inclined axes similar to those of the plaintiff, but with a steel spring substituted for the indiarubber spring, and producing a similar effect.

The defendant admitted the utility of plaintiff's roller skates, but contended that some parts of the alleged invention were useless, and that the specification was bad on those and other grounds. Novelty and infringement were also in issue.

The defendant's particulars of prior publication were as follows: "The alleged invention was published in England in a number of a periodical publication called The Commissioners of Patents' Journal, dated and published the 6th of February, 1863, a copy of which number was placed in the Patent Office Library on the day of publication, and had been there open to the inspection of the public from that date. The said journal was also largely circulated in England, and many copies of the said number were sold to various persons and libraries in England before the date of the letters patent. The alleged invention was also published in

a number of a periodical work called the Scientific American, dated and published January 24, 1863 (1), which had been imported into England before the date of the letters patent, 534] and in *particular, one copy was received at the Patent Office Library in February, 1863, and had been there open for public inspection. It was also published in the form of a sketch forming one of the illustrations to the Report of the Commissioners of Patents of the United States of America in the year 1863, which sketch was placed in the Patent Office Library in London, in July, 1865, and was there open to public inspection. The sketch was a copy of the one in the specification of the American patent, and was identified by the like number."

The following is the description of the skate from the said number of the Scientific American:

"37,305. Skate. J. L. Plimpton, New York City.

"I claim, first, the attaching or applying of the rollers, *E*, or runners, *E*, to the stock or foot-stand, *A*, of a skate in such a manner that said rollers or runners will be turned, cramped, or adjusted so as to run the skate in a curved line to the right or left by the turning or canting of the foot-stand or stock, *A*, as set forth.

"Second. The plate, *H H*, provided with hooks, *g*, at their ends and racks, *f*, at their front edges, in combination with the spring, *I*, and plate, *G*, the latter being applied to the stock or foot-stand, *A*, and provided with slots, *e*, at its ends, and all arranged, as shown, to form a fastening at the front end of the skate, as herein shown and described."

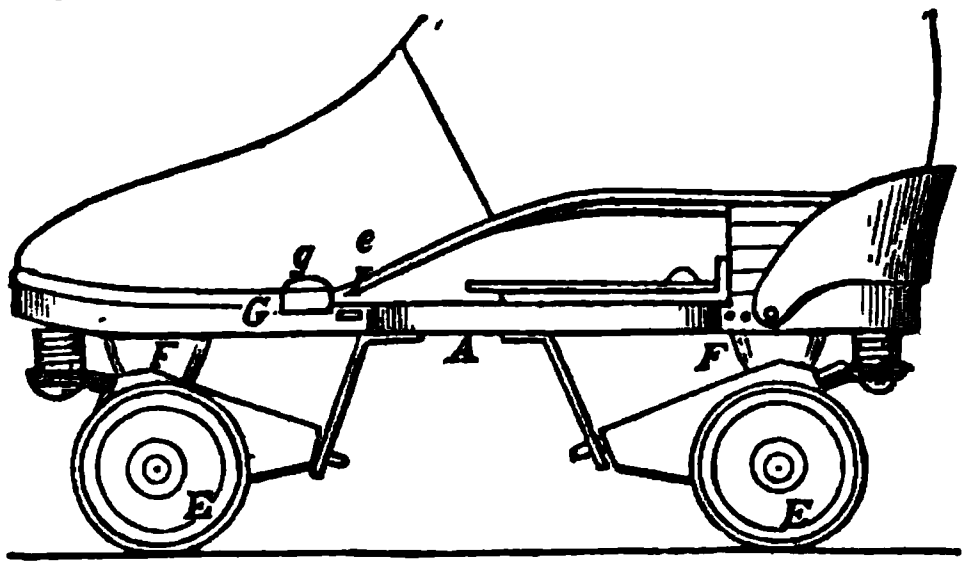
"[This invention relates to an improvement in the attaching of the rollers or runners to the skate, whereby the former are made to turn or cramp like the wheels of a wagon and facilitate the turning of the skate—there being two pairs of rollers or runners to each skate. The invention also relates to an improved fastening for securing the front part of the boot or shoe to the skate.]"

The same description, omitting the last paragraph, appeared in the number of the Commissioners of Patents' Journal before referred to.

The following is a copy of the sketch above referred to which was contained in a volume of a work published by 535] Jewitt, of *Buffalo, U.S., containing illustrations of American patents taken from the Report of the American Patent Commissioners for 1863:

(1) Page 60.

37,805.



The defendant also denied the plaintiff's allegation as to the novelty of his invention, on the ground that the skates with indiarubber rollers commonly used long before did enable the skater, by the pressure of his foot and the tilting or canting over of his body, to cause the skate to move in a curve; and such skater did so move, though the means employed were different from the plaintiff's. The answer contained the following passage on this point: "The means used in the plaintiff's alleged invention are a mechanical connection whereby the rotation of the skate stock about a horizontal axis produces a rotation of the roller axles about a vertical axis. There was no novelty whatever in such a mechanical connection, which is, and has been for a long time anterior to the plaintiff's alleged invention and the letters patent of the said A. V. Newton, among the well known means of converting circular motion about one axis into circular motion about another. If there was any novelty in the plaintiff's alleged invention when first made in America, it consisted simply in the idea that it would be a good thing to have a mechanical connection between the rotation of the skate stock and the rotation of the rollers, instead of trusting to friction and yielding of elastic rollers to produce the curvilinear motion as had previously been usual; but I submit that such idea would not be the subject of a patent. Any reasonably skilful mechanic could, without any assistance from the plaintiff's alleged invention, or the said specification of A. V. Newton, effect such mechanical connection in any one of several known ways. The idea of using a mechanical connection for this *purpose, and [536 the nature and details of the plaintiff's method, had been published in England, as aforesaid, before the date of the said letters patent. The method by which the plaintiff effects the mechanical connection is such that the rollers are ranged in pairs, two pairs being placed under each skate on

axles which, when the skate is at rest, are parallel to each other, and that the rollers are applied to the skates in such a manner that the skater can, by tilting the skates laterally by the pressure of the foot, turn to the right or left at will, and perform curves and evolutions, not with the greatest ease, but, after practice, with considerable facility. The description so given, however, includes every conceivable method of converting the rotation of the skate stock into rotation of the rollers, and would be applicable to skates very different from those described in the said specification of A. V. Newton. If the said specification claims every skate which would fall within this description, it is, as I submit, bad, as claiming too much."

By an order made in the cause, dated the 24th of June, 1875, it was directed that the following questions of fact be tried before the court itself without a jury:

1. Was Alfred Vincent Newton the first importer into Her Majesty's realm of the invention for which the letters patent of the 25th of August, 1865, were granted?

2. Was the invention new within Her Majesty's realm at the date of the letters patent?

3. Did the specification particularly ascertain and describe the nature of the invention, and in what manner the same was to be performed?

4. Has the defendant wrongfully, and in contravention of the said letters patent, used the said invention?

It was ordered that the defendant should be at liberty under the third issue to dispute the utility of parts of the alleged invention although he had not raised the general issue as to utility.

The case now came on for hearing on these issues.

Matthews, Q.C., *Aston*, Q.C., *Waller*, Q.C., and *Lawson*, for the plaintiff: This patent was taken out by Newton in 1865 as agent for the plaintiff, who received from the plain-
537] tiff a specification and *instructions from America, and corrected them to put them in proper shape to file here. Roller skates were not unknown either in England or America before that time, but the particular construction which is the subject of this patent was the plaintiff's own invention. He had taken out previous patents in America, in which the same principle was applied. The principle is this: instead of having a fixed axis, there is a strong double metallic frame screwed to the foot-stock with two bearings; there is one at the upper end provided with a cup or cavity in which the journal can be pivoted, and a pivot at the other end forming the other bearing. Thus the roller frame

has two corresponding points fixed relatively to the foot-stock. A journal at one end is inserted in the cup, and a circular bearing at the other end which carries on the other pivot—these two bearings playing freely on the fixed bearings. The result of this is motion about an inclined axis.

The essential features of the invention are, first, that in this skate you have the power of setting the axles of the rollers out of parallel—in other words, there is a converging power in the roller axles, the consequence of which is that the skate runs in a curve while bearing on all four rollers; secondly, you have a complete power of varying the convergence at your pleasure, making it greater or less according as the foot, and with it the foot-stand, is more or less inclined or tilted laterally right or left by a simple motion in a vertical plane, thus enabling you to perform figures of every kind; lastly, this converging power is produced by one simple motion of the foot or the foot-stock.

Another feature of this skate is an adjustable spring enabling the foot-stock to recover its position after it has been tilted over.

The plaintiff has also applied the same construction to runner skates used upon ice by substituting four runners for the rollers, fixed firmly on the same axle-blocks, enabling the skater by the mere tilting of the foot to make any variety of curves he may think fit.

There can be no doubt about the defendant's infringement; indeed it is scarcely contested; but the defendant, besides denying the sufficiency of Newton's specification, also disputes its novelty, alleging prior publication in this country; but we contend that the descriptions of the plaintiff's invention contained in the *Scientific American [538 and the Commissioners of Patents' Journal, and in the sketch relied on, were never published within this realm, and further, that the descriptions are not sufficient to disclose this invention.

Hemming, Q.C., *Macrory*, and *Millar*, for the defendant.

The case having been opened, the evidence was gone into, and, first, the defendant's counsel were allowed to adduce evidence of prior publication.

R. B. Prosser, who had been employed in the library of the Patent Office for nearly twenty years, produced the number of the Scientific American of the 24th of January, 1863, and gave evidence to the following effect: That when new books arrived they were entered by the librarian in a book or register and placed on the shelves, sometimes in the reading-room and sometimes in the other rooms of the

library which were not accessible to the public; that the Scientific American was received at the library about a fortnight after publication, and would be placed on the table of the reading-room immediately afterwards; that a volume of illustrations accompanying the Report of the Commissioners of Patents for the year 1863 was received at the library on the 20th of July, 1865, but he could not say in what room it was first placed.

He also produced a volume of the Commissioners of Patents' Journal of the 6th of February, 1863, which he said, when published, was placed on the library table, and which was distributed gratis to all the free libraries in the country within a week after publication.

He also produced a volume of illustrations accompanying the Report of the Commissioners of Patents for the year 1863 on Arts and Manufactures (1), published by Jewitt of Buffalo, U.S., which appeared from a pencil entry made at the time by the witness to have been deposited in the library on the 20th of July, 1865, the American war having delayed its arrival. He stated that it was not entered in the register of donations; that he did not remember in what room it 539] was put, but it certainly would be *in the library if any one chose to ask for it. He had not the slightest doubt that the book was on the 20th of July, 1865, accessible to the public in the Patent Office Library. He had not looked into the catalogue for an entry of the book, but such entries would not show the times when they were made, nor could he say how long after the arrival of a book it would be before it would be put in the catalogue; the librarian made it up from time to time.

The plaintiff's evidence was as follows:

Mr. Alfred Newton stated that he had received from America in 1865 a draft or copy of an American specification of Plimpton's skates with figures, that certain slight alterations were made by himself and his draftsman, and the specification and figures as altered were filed by him. He was of opinion that the figures both in the American draft specification and his own showed the runners vertical, but said that he had come to produce the papers and not as a scientific witness, and had not considered the specification for years. He supposed his draftsman had left out the shaded swans as an absurdity. He considered that the invention was new in England in 1865.

Mr. F. J. Bramwell, president of the Institution of Mechanical Engineers, said he knew no earlier skate in which

(1) Vol. ii.

the curved path was obtained by making the roller axles converge. The arrangement of the two inclined axes for giving this convergence was a device which he had never met with for any purpose. He did not recollect any machine in which that kind of transmitted motion was combined in that simple way—at any rate, it was new in skates. Malcolmson's skate had the same apparatus for causing convergence, and a metal spring instead of an indiarubber spring. The two were substantially the same. The device of the inclined axis was there, and the convergence of the roller axles was produced by identically the same mechanical means.

On the question of prior publication he said that the letter-press in the Scientific American showed only that the rollers would in some way adjust themselves to run in a curve, but gave no indication of the means by which the object of the invention was to be attained. The words "like the wheels of a wagon" would well convey in 1865 that there should be a sort of perch-pin. Coupling the sketch with the description, he would have looked for a vertical *axle somewhere in *F*.. He said that the ring around [540 the vertical cylinder near the toe forbade him to read the sketch as showing an inclined axle. He did not think there could be rotation without the ring rotating. On being asked if the axle-block could not rotate consistently with the drawing without the ring rotating, if there were a hole in the block and a fixed pin, he admitted that it could, and said he thought it would be an odd way, and it had not occurred to him before. In the sketch, *F* was a rounded lump. If he assumed an inclined axis that lump would stand in the way of any motion if rigid, and it must therefore be a substance not rigid which would recover its form when pressure was removed. Being asked whether, when he had once got an inclined axis, the lump *F* would not suggest to any competent person indiarubber as its material, he said, "I dare say it might;" but this would not be so if, as he considered, the sketch did not show an inclined axis. On the question as to the runner skates, he said that the runners were vertical in the figures both of the American draft specification and of Newton's specification, but that Newton's figure omitted the swans. In the draft figure the swans were shown foreshortened, but the runners were shown vertical, and the plate *R* was also shown vertical. If he was told to take it that the plates were inclined, he should say there was a trifling error in the figure. With the swans in, he should conclude that the thing as a whole was canted, and

that the draftsman had left out the line; that "would be his conclusion—very likely a wrong one." The cited passage being read, the witness said that with that and Newton's figures before him he should have made the runners vertical, but with that and the American figures he should, after attentive study, have made them inclined, assuming an error in the draftsman in not showing the runners as well as the swans inclined.

Mr. Imray, C.E., said that the cited passage told him very clearly that the runner must be slightly inclined, enough to make one edge wear before the other. By a slight inclination he meant "perhaps five or six degrees from the vertical, which would quite answer the purpose." Looking at Newton's figures only, he would imagine that the runners would be vertical; but taking the whole specification with the figures, a skate-maker would make them inclined, but no 541] one would put them in at a great inclination—*probably it would be five or six degrees—just enough to give a bearing on the edge instead of the flat face. A man might put them in at a great angle if he thought it necessary. There would be no contradiction of the pictures, because a man does not expect to see foreshortening in such figures. He thought five or six degrees of inclination might give bite enough to enable a man to skate, though the horizontal pressure on the ice might rise, say, to eighty pounds, but it was so long since he skated that he could not say he knew that would be so. With reference to the prior publication, the witness said he agreed with Mr. Bramwell's interpretation that the sketch pointed to a perch-pin. He read the Scientific American as saying that the "turning, cramping, or adjusting" of the rollers was a mechanical consequence of the "turning or canting of the foot-stand or stock." He also testified to the identity in principle of Malcolmson's and Plimpton's skates, and said that not only was Plimpton's use of the inclined axis new in 1865, but that with large experience of machinery he did not at the present time know of any machine, except Plimpton's skates and subsequent roller skates embodying the same idea, in which a similar motion was employed.

Mr. Plimpton said that he had used runner skates on ice, that he could skate with vertical runners as well as with inclined runners if the vertical runners were fluted at the bottom. He had made runner skates in America and skated on them in 1863. His daughters had skated on runner skates in New York. Runner skates had never been brought to England or made here. He had had some made before

before taking out his patent of 1866 in America, and the draft specification sent to Newton was, he thought, prepared from the same model as those skates. He did not think that the workmen worked from the specification. The skates he skated on in 1863 in America generally had the runners inclined, but he made some (less than half a dozen) with vertical runners fluted like an ordinary fluted skate, that is, with a deep groove in the bottom, so as to make sharp edges. He could skate on vertical runners without fluting on ice soft enough to yield to pressure, but not on ordinary ice, unless the base of the runners was fluted with a deep groove. It would be absurd to *expect skates to [542 be used for any practical purpose on ice when you depended for your bite on the friction between a flat surface and ice. Where the runners were set vertically he got the bite by making a deep groove. Being asked what amount of inclination of the runners would be required for skating safely without fluting, the witness said he should judge twenty degrees. That would be a good practical thing. He could skate with runners at any less inclination, even at none at all, as he had before said, but that would depend on the condition of the ice. The skates his daughters skated on had runners inclined at "perhaps an angle of twenty degrees."

The plaintiff also put in several models, the general character of which was that they agreed with Jewitt's sketch, but the convergence of the roller axles was not a mechanical consequence of the canting of the foot-stock with all four rollers on the ground, though one of the roller axles could be made to converge towards the other by lifting the rear rollers off the ground, and at the same time turning the skate stock about the point of attachment of the front axle-block. In one instance it was suggested by some witnesses that convergence could be obtained with all the rollers on the ground, but other witnesses said that this effect was deceptive, and was due to loose and wabbling work, and not to the construction of the model.

The evidence for the defendant was in substance as follows: Mr. E. A. Cowper, member of the Council of the Institution of Civil Engineers and Mechanical Engineers, said that the Scientific American and Jewitt's drawing explained the construction of a skate in which the wheels were to turn on the ground like the wheels of a wagon, and that the mechanism for the purpose was shown by the inclined pins or axles shown in the drawing. If a workman made the thing shown in the drawing and explained by the letter-press he could not fail to produce the effect. He would fail

with the letter-press alone, because the means were not shown, and would probably fail with the sketch alone because the object was not disclosed. The letter-press told the witness that the "turning, cramping or adjusting" of the rollers was a mechanical consequence of the "turning or
543] canting" of the foot-stand. The *one motion was to cause the other, not merely to permit it. Then Jewitt's drawing showed how that was to be done—showed the inclined axis by which one motion caused the other. It was just the solution of the problem. If this were put into the hands of any competent skate-maker he would do it directly. He would have put in the inclined axis—he would have done so in 1865. The witness did not think it at all an odd arrangement to make the rotation about a fixed pin. It was the method adopted in every cart or carriage.

With reference to runner skates he said that the skate, if on vertical runners, would slip away on attempting to go in a curve, unless the ice were so soft that it sank in. A workman having Newton's specification would put the runners in vertically; it would require invention to make them inclined.

Mr. George Edwards, a machinist in the employ of Messrs. Holzapfel & Co. He was one of a class of seven or eight of the best workmen, who had equal wages, and others had less. He was instructed by the manager, Mr. Pomeroy, to make a machine from a description and sketch taken from the Scientific American and Jewitt's drawing. He produced a model having inclined axes, like Plimpton's skate, but without any springs or anything corresponding to the lump *F*. In the description supplied to him the words "like the wheels of a wagon" and "the turning of the skate" were underlined. He had no communication from Mr. Pomeroy except that Pomeroy read to him the letter-press and gave him that and the sketch, and told him to make it. He had never seen a roller skate before, and knew nothing about them except that he knew roller skates were used on rinks. Before completing the model he made a rough model which did not admit of rotation about an inclined axis, and would not work. He then loosened the bearings and made it work, and then he saw that an inclined axis was the right thing, and made his finished model in that form. He said he left out *F* because there was no letter-press referring to it, and he could not make it out. He had no communication on the subject from his first instructions until he had finished the final model. Mr. Pomeroy came and saw the rough model, but the witness could not remember what state it

was then in, or whether Pomeroy took up the model, or anything that passed *on that occasion. In cross- [544
examination the following questions and answers occurred:

Q. In the model which you have made, is there anything which is cramped like the wheels of a wagon?—*Ans.* No.

Q. Then you did not attach or propose to attach the rollers of the skates in a manner so that they may turn or cramp like the wheels of a wagon?—*Ans.* Yes, partly.

Q. That is what you intended to do?—*Ans.* Yes, in part.

Q. But then you have not done it in the model?—*Ans.* Yes.

Q. Then do you recall your other answer? *Ans.* In part.

Q. You will modify your answer by telling me that you have there something which is cramped like the wheels of a wagon in part?—*Ans.* Not cramped—turned. I do not know what the word "cramped" means.

Q. Did you ever see the wheels of a wagon that turned on any other axis than a vertical axis?—*Ans.* No.

Q. Then besides not understanding the meaning of "cramped," you have not, in your model, proceeded to make your wheels turn like the wheels of a wagon?—*Ans.* No.

Q. You have departed from your instructions in that respect?—*Ans.* In part.

Q. Then did it occur to you that the direction given that you were to make the wheels turn like the wheels of a wagon was a wrong direction?—*Ans.* Yes.

Q. And you thought it necessary to correct that direction by your own intelligence, did not you?—*Ans.* I did not understand the word "cramping," consequently I could not.

The MASTER OF THE ROLLS: "Turning," you are asked.

Q. You thought it necessary to correct the wrong direction here, that the wheels were to turn like the wheels of a wagon, and to apply your intelligence to do something else; is not that so?—*Ans.* Yes.

Q. And you did, by your own intelligence, devise another plan, did not you?—*Ans.* Yes, without departing from the drawings.

Mr. Henry Botten, a machinist, carrying on business for himself, was employed to work from the letter-press and sketch taken from the Scientific American and from Jewitt. He had no previous *knowledge of roller skates, and [545
no other instructions. He made first a small model and took it to defendant's solicitors, and a gentleman told him to make another. The witness asked if it was to be the

same size, and was told it would be as well larger. The witness believed the gentleman was satisfied with the first model. He then made a larger model, and increased the length of the axles so as to make the foot-stock lock on the rollers. The first model also had slots not in the drawings, and the witness before making the second model saw that these were not required, and omitted them in the second model. In other respects the models were similar. Both had inclined axes, and neither had anything corresponding to the lump *F*, which the witness said did not seem to him to be necessary.

Mr. R. C. May, C.E., said that, looking at the Scientific American and the sketch in 1865, he should have found the inclined axis, and also that *F* was an elastic lump.

He considered that both the draft American specification and Newton's, with their respective figures, indicated that the runners and swans were to be vertical.

Mr. Hulse, mechanical engineer, formerly a partner in Whitworth & Co., said that until last Thursday his mind was a blank on the subject of roller skates, except that he had seen in shop windows the old indiarubber skates with straight-line rollers. On that day a copy of the Scientific American and Jewitt's drawing was brought to his attention, and he understood it to mean that the horn-plates or axle-blocks were pivoted on inclined axes. *F* perplexed him at first, but on pondering, he considered it was a stop which would be made elastic. "Turning like the wheels of a wagon" meant the wheels themselves turning, not the mechanism by which they turned. Had employed workmen largely to work from drawings and specifications, and had been a workman himself. A skilled mechanic accustomed to work from drawings would be able to make the skate from these materials; a mechanic employed merely to turn a lathe or work at a vice would not. An average skilled workman of general knowledge and experience would be able to do it. Reading drawings and specifications was like reading music at sight. Some men had an aptitude for it which others had not.

546] *With reference to the runner skates, the witness thought that a workman would first make the runners vertical, and when he found the inconsistency, would get further instructions. If he could not, some workmen would have resource enough to get over the inconsistency between the drawings and the letter-press, and would then incline the runners, limiting the inclination to the object of enabling the edges to be successively used. Three or four degrees he

should think enough, but six at the outside. No workman would look to a view from below to see whether the runners were inclined or vertical. If you wanted to show the inclination, the proper thing would be to give an end view. Being asked, in cross-examination, whether a workman would be likely to put the runners in sloped, he said he did not think one workman in a hundred would appreciate the language; he would make the mistake first, then he would find from the letter-press that the object of avoiding sharpening was not accomplished, and would conclude he had done wrong, and would do it again. This would puzzle him more than the 1865 description and sketch, because there the letter-press and drawings corresponded; here the letter-press and drawings were inconsistent. Nothing would trouble a workman more than that.

Evidence was also given that the Scientific American and Jewitt's drawings were read as showing the inclined axis by another witness, E. J. C. Welsh, a mechanical engineer, who had no previous knowledge, and it was also proved that Plimpton skates without the indiarubber springs had been skated on with facility.

Hemming, Q.C., for the defendant: The plaintiff's specification is ambiguous, and therefore void for uncertainty. It is a claim "for applying rollers or runners to the stock or foot-stand of the skate as described, so that the said rollers or runners may be cramped or turned so as to cause the skate to run in a curved line either to the right or left, by the turning, canting, or tilting laterally of the stock in foot-stand." These words leave it ambiguous whether the claim is for the whole machine and each part of it as new, or only for a combination including both the inclined axes and the indiarubber spring or buffer. If the latter, we have not infringed; but if the claim is *read as asserting nov- [547
elty in the inclined axes, we have; and in that case we shall succeed on the novelty issue if we prove that any skate with an inclined axis was published in England before the date of Newton's patent. There is a material difference between a combination patent and a patent for a machine: *Lister* v. *Leather* (1).

In *Holmes* v. *London and North Western Railway* (2), where Harrison had obtained letters patent for an invention for an improved turning-table for railway purposes, which he claimed as being "entirely new and never before used in the United Kingdom," it appeared that shortly before the patent was granted some one else had invented a turning-

(1) 8 E. & B., 1004, 1017. (2) 12 C. B., 831; 1 Macrory, 5.

table which had some features common to this, but omitted an essential part of his invention, and it was held that the patent was not a good one, as the general claim amounted to a claim of novelty for every essential part of the machine not described as old.

[JESSEL, M.R.: If the present form of claim had been put in, and if there had been a specification previously published containing the whole invention *minus* the buffer, this would be a bad specification for want of novelty.]

Then the result is that we have infringed, but that any skate with inclined axes on the principle of Plimpton's would be an anticipation, and I will argue the case on that footing.

The second objection to the specification is want of novelty. This is not "a new manufacture within the realm" so as to bring it within the operation of the Statute of Monopolies (21 Jac. 1, c. 3).

I contend that there had been a previous user in this country in this sense, that there had been a prior publication.

In the case of *Lang* v. *Gisborne* (1), where an invention was described in a book published in France, a few copies of which were sent to England to a bookseller for sale, it was held that this was a publication of the invention, and that no valid patent could afterwards be taken out in this country for the same invention. In that case only four
548] copies appear to have been sold in England, *and Lord Romilly observed: "It is not necessary to establish the fact that one copy has been sold, for I think that as soon as an inventor informs the public of what his publication consists, and prints it in a book which he sends to the publisher to sell, from the moment that the book is exposed to sale in the bookseller's shop there becomes in point of law a complete publication of the invention."

[*Aston*, Q.C., referred to *Heurteloup's Patent* (2).]

That case, so far as it goes, is in our favor.

Here we have an *à fortiori* case of prior publication, for the evidence shows that the Scientific American was in the library of the Patent Office, and was accessible to the whole of the public. That is the very place where the public interested in mechanical matters would go to find out what was done. This is, I submit, far more of a publication than putting a few copies of a French book for sale in the window of a bookseller's shop. Even if the book were not immediately put in the catalogue, it would not affect the question of publication, and there is no evidence to show

(1) 31 Beav., 133. (2) 1 Webs. P. R., 553.

when it got into the catalogue. The description in the Scientific American, coupled with the drawing, would be sufficient to enable a man to make a skate, if not exactly like the plaintiff's, yet with the one distinctive feature in it, namely, the inclined axis, which furnishes the ground of the plaintiff's claim. In fact, there is such a description as would prevent any one subsequently taking out a patent. The question of the sufficiency of description was considered in *Young* v. *Fernie* (1), *Betts* v. *Menzies* (2), and *Neilson* v. *Betts* (3).

The evidence of the experts shows that the letter-press in the Scientific American, and the drawing together, would not only enable an ordinary skilled workman to make a skate with the inclined axis, but would also suggest, though that is not necessary for my case, that the indiarubber buffer might be added. The statement at the end of the description in the Scientific American is as follows: "This invention relates to an improvement in the attaching of the rollers or runners to the skate, whereby the former are made to turn or cramp, like the wheels of a wagon, *and [549 facilitate the turning of the skate, there being two pairs of rollers or runners to each skate." Any one looking at this would see that it is a part of the description of the invention. Then, looking at the description itself, we read that the inventor claims "the attaching or applying of the rollers or runners to the stock or foot-stand of a skate, in such a manner that the said rollers or runners," which on any fair construction must mean all four rollers, "will be turned, cramped, or adjusted, so as to run the skate in a curved line to the right or left by the turning or canting of the foot-stand or stock." By the word "will," I submit that the turning or canting of the foot-stock is stated to be the mechanical cause of the turning, cramping, or adjusting of the rollers. Further, it shows that these rollers are to run the skate in a curved line, as the mechanical consequence of the canting of the foot-stock, and the consequent cramping, turning, or adjusting of the rollers, and not merely to permit it so to run. An average workman could, it is proved, at any rate after a few trials, make a skate from this description and the drawing which would be practically the same as the plaintiff's. The evidence shows that this has been done. And as to the sort of workman, sometimes described as an average workman, sometimes as a competent workman, to be taken as the test workman, I submit that the distinction is not between a man clever at reading

(1) 4 Giff., 577. (2) 10 H. L. C., 117. (3) Law Rep., 5 H. L., 1.

specifications and a man indifferently stupid at that work, but between a man who brings reading power to bear and a man who brings inventive power to bear. If you exclude every clever reader, you make it impossible to patent any very complicated machine, because a very complicated specification cannot be read by any but specially clever workmen. As to the models produced by the plaintiff, they help our case, because they show that the plaintiffs, with the able assistance at their command, have only been able to produce an apparent resemblance to the sketch without the inclined axes, by introducing inofficious parts. Even then they cannot get convergence with all the rollers on the ground, and even on two rollers, the motion of the rollers is not mechanically connected with that of the foot-stock. They read the words "the said rollers" as meaning "two of the said rollers," and they read "will be turned" as if it were "may be turned."

550] *The only way in which my friends get out of this conclusion is by shutting their eyes to the important part of the letter-press which explains the sketch, and confining their attention to the clause which contains the words "like the wheels of a wagon." This is not, I submit, the way to look at it. You must look at the whole.

Next, I contend that the plaintiff's specification is insufficient to show a competent workman, without ambiguity, how to make one of the inventions which he claims, namely, that of a runner skate. It deals with roller skates and runner skates in the same way, and it claims to protect the use of the inclined axle in the runner skate just as in the roller skate. I submit the following as propositions of law: First, where a specification relates to two different inventions, it is bad altogether if it fails to describe either the one or the other. Secondly, a specification is bad where it gives or suggests two methods of making a machine, one of which will succeed and the other fail. Thirdly, a patentee must show not only a way of making his machine, but the best way of making it that he knows: *Rex* v. *Arkwright* (1); *Bovill* v. *Moore* (2). The case of *Neilson* v. *Harford* (3) also shows that even with respect to a small matter it is essential to give a sufficient description, and that the omission to give it in any particular will vitiate the patent.

[JESSEL, M.R.: The law goes further, as stated by Baron Alderson in *Morgan* v. *Seaward* (4). "If a patentee is acquainted with any particular mode by which his invention

(1) 1 Webs. P. R., 64.
(2) 2 Marsh., 211.
(3) 1 Webs. P. R., 295, 321.
(4) Ibid., 174.

may be most conveniently carried into effect, he ought to state it in his specification."]

Applying these principles to the plaintiff's specification, an ordinary skilled workman, who would not otherwise know the meaning of a runner skate, for the thing has never been seen in England, could not from Newton's specification, including the drawings, discover that sufficient obliquity must be given to the runners to enable them to bite the ice. He omits, therefore, an essential part of the description. This appears from Mr. Plimpton's *own [551 evidence, for, in answer to your Lordship's question, "What amount of inclination would be required for safely skating upon the runner—how many degrees?" he gave this answer: "I should judge 20°; I should say that 20° is quite practical." And, again, to the question, "For all ordinary purposes you would get the bite at 20°?" the answer is: "Yes, that would be a good practical thing."

This being the conclusion to which Plimpton's experience had led him, there is, nevertheless, not a hint in the specification that an inclination of 20°, or any other amount, is necessary. That knowledge he has not communicated, and therefore the specification is bad, even if we assume in the plaintiff's favor that the specification does vaguely suggest an inclination sufficient to wear one edge before the other, which no witness puts higher than 6°. All the evidence shows that a workman would from this specification put the runners in, either vertical or with an inclination of not more than 6°, and that there is nothing to lead him to give such an inclination as is necessary to give the required bite. Without this the skate would not only not be in the best known form, but would be absolutely dangerous and useless. As Mr. Plimpton says, it would be absurd to put it forward as a practical thing.

In the next place, the patent in this country was taken out by Newton on a draft specification and sheet of figures received by him from abroad. He made some alterations in these and then took out the patent. If the alterations thus made were material, and he did not state what part was communicated from abroad and what was his own invention, the specification would not be good: *Renard* v. *Levenstein* (1); *Milligan* v. *Marsh* (2).

If Newton knew what Plimpton knew, and what I submit that the drawing and specifications sent over by Plimpton told him, namely, to give such inclination as would make the runners bite, then his patent is bad, because he has not

(1) 10 L. T. (N.S.), 177. (2) 2 Jur. (N.S.), 1083.

disclosed the best mode of making the machine. If he did not know that, then I submit that his specification is bad, because he has described a machine which will not work without fresh experiment to improve it. Taking it either way, I submit that the specification is bad.

552] **Macrory*, and *Millar*, on the same side.

JESSEL, M.R.: I do not wish to trouble you to reply, Mr. Matthews. Perhaps I am wrong in saying it, but I have for some time made up my mind on the case.

The issues which I have to try are what one might almost call the ordinary issues in a patent cause. The first is the issue of novelty, which assumes the double form of whether Newton was the importer, and whether the invention was new; but I take it that comes to the same thing, because the real question is whether it was new within the realm. That Newton was the man who took out the patent is certain; and, as far as I know, there is no law which says that if a man from abroad communicates to A., who communicates to B., B. may not take out the patent. Therefore, substantially, the first issue is that of novelty. The second issue is what we call sufficiency of specification. There is another issue, which is what we call the issue of infringement. There are, in fact, three issues.

I am not going to state in detail what the evidence is; and whoever reads my judgment will not expect to find in it an exact account either of the specification of the invention, or the evidence. I will give general results from memory, and state what I consider to be in substance what they amount to.

First of all, as regards the infringement. Mr. Newton's patent, in respect of which the plaintiff, though he is the original inventor, merely sues as the assignee—is a patent taken out, on the 25th of August, 1865. Mr. Malcolmson, the defendant, took out a patent—which I am sorry to say, appears to me, so far as this patent is concerned, to be a great abuse of the Patent Laws—in the year 1874. The original patent, that is, Newton's patent, was for a machine called a skate, either for a roller skate or a runner skate.

The invention, if I may say so, was twofold. There was a mode of making either a roller or a runner skate describe a curve, by merely a lateral pressure of the foot on the skate. That was the substance of it. It was a change of motion, or a conversion of motion. The lateral pressure of the foot

553] of the skater was, by *well-known and mechanical means—such as levers and axles, and so on—communicated to the wheels in such a way that the axles of the wheels

came out of parallelism, and converged round the centre of a circle. In other words, it was a change of one kind of motion to another kind of motion communicated to the wheels; and it enabled the skater, therefore, to move in curves upon a flat surface, and to move easily. That was the main object of that part of the invention. A subordinate part of the invention was this: It was desirable to some extent to regulate or check that conversion of motion; and for that purpose he put in an indiarubber spring, or buffer, as it has been called, which could be made stronger or weaker by tightening or loosening a screw. That was a subordinate part of the invention. The main part was the change of motion; the subordinate part was what I may call the regulating or moderating the motion. But the whole invention was a machine or skate which would work in this way to describe a curve easily and readily by the lateral pressure of the foot.

There was a second part of the invention, which was this: He applied the first part of the invention both to a roller skate, which had rollers and wheels mounted on an ordinary flat surface, and also a runner skate. He took off his rollers and wheels, and put in the place of them little pieces of metal with sharp edges, and they would adapt the skate to skating on ice. I do not suppose the skate was so much meant for skating on ice, because there is no difficulty with the common skate in making curves on ice—at least to a good skater. But, at the same time, no doubt this same kind of machinery, which readily produces the curves on a floor on which there was considerable friction, would produce curves on the ice; and there is no doubt you could skate on the ice with it, and so far it was a useful invention. But, in addition to that, he claimed something entirely different. He claimed this: If you have an ordinary skate, it has a long blade, if you may so call it, a piece of iron at the bottom; and if a little bit of grit or a stone caught it, it made a little notch, but you could go on skating. You need not send your skates to the grinders. But when you put little runners, as Mr. Plimpton did on to his skate, and then a stone or bit of grit caught the runner, this was so small it most likely would spoil the runner, and the consequence *would be that you would have to stop skat- [554
ing and have your runner ground up again—so he adopted this device: He made a runner with four sharp edges, and he made it a movable thing, so that it could screw in and out of the holders; and then, if any bit of grit spoiled one edge of the runner, you had nothing to do but to unscrew

it and put another edge out, and all four edges could be used successively. The second invention claimed by the patent was a claim of these runners. I do not suppose Mr. Plimpton would have taken out a separate patent for it, but it was an invention that made the runner skate more valuable than it would otherwise have been, and, as far as I understand, it was new at the time. That is the second part.

Now, what he complains of as an infringement by the defendant Malcolmson, of the first part of the invention, is of what I will call the conversion of motion. I do not know that I can describe it better. The mode in which he carried it out was by a very novel and ingenious application of a diagonal axis below the foot-stand of the skate, and this mode of carrying it out was not only new at the time (as appears from information given to me by the evidence of experts), as applied to a skate, but it was new altogether. It was a new mechanical contrivance, that is, that peculiar combination of known mechanical elements for producing this conversion of motion was a new mechanical contrivance. The defendant Macolmson, who, we may assume, was perfectly aware of Newton's patent, takes out a patent in 1874; and in his complete specification he describes what, to my mind, is exactly the same skate. When I say exactly, I mean in substance the same. It is the same skate, with a merely colorable variation. He has taken the whole of the mechanical contrivance, which was new, as the French would say, *en bloc*. He has simply taken it in. He has made a slight variation in this way. He has substituted for the india-rubber spring, or buffer—which was movable in the sense that it could be tightened up or not by a screw, adaptable or adjustable in that sense, according to the wants of the skater—a steel spring, which is a mere mechanical equivalent. It is a little worse than the plaintiff's expedient, because the steel spring cannot be adjusted by turning, and so made stronger or weaker. It is, therefore, a colorable
555] variation for the worse; and, for this thing, which *is, in fact, the plaintiff's invention, and nothing else, he has had the courage to take out a patent, and this is the patent which is complained of. The infringement is so palpable, so patent, and so obvious to every one, that his very able counsel, who have argued the case with the greatest elaboration, did not think it worth while to address me on the subject, or contest the point of infringement. Therefore, upon that issue, of course, the verdict will be for the plaintiff.

The next point is what I will call novelty. The act of Parliament (21 Jac. 1, c. 3), on which all these patents are founded, tells us this: that to come within the exception of the Statute of Monopolies, a man who has the patent must be the first and true inventor, and he must describe something in his specification which is not already known and used. What is the meaning of a first and true inventor? To ascertain its meaning, you must have recourse, no doubt, to various decisions given on the statute, which is very nearly three hundred years old. It is not for a judge of the present day to give his meaning as to what should be attributed to the words of the statute. He must take the construction put on the statute to be of the same effect, as guiding him to a correct decision, as if that construction had been enacted as part of the statute.

In order that those who may have to consider my judgment hereafter may know the view that I take of the statute combined with decisions, I will state the result at which I have arrived. As I understand, shortly after the passing of the statute, the question arose whether a man could be called a first and true inventor who, in the popular sense, had never invented anything, but who, having learned abroad (that is, out of the realm, in a foreign country, because it has been decided that Scotland is within the realm for this purpose) that somebody else had invented something, quietly copied the invention, and brought it over to this country, and then took out a patent. As I said before, in the popular sense he had invented nothing. But it was decided, and now, therefore, is the legal sense and meaning of the statute, that he was a first and true inventor within the statute, if the invention, being in other respects novel and useful, was not previously known in this country—"known" being used in that particular sense, *as being part of what had been called the common or public knowledge of the country. That was the first thing. Then there was a second thing. Suppose there were two people, actual inventors in this country, who invented the same thing simultaneously, could either be said to be the first and true inventor? It was decided that the man who first took out the patent was the first and true inventor. Then there was another point. If the man who took out the patent was not, in popular language, the first and true inventor, because somebody had invented it before, but had not taken out a patent for it, would he still, in law, be the first and true inventor? It was decided he would, provided the invention of the first inventor had been kept secret, or, [556

without being actually kept secret, had not been made known in such a way as to become a part of the common knowledge, or of the public stock of information. Therefore, in that case also, there was a person who was legally the first and true inventor, although, in common language, he was not, because one or more people had invented it before him, but had not sufficiently disclosed it.

It will be seen, that both as regards the man who brings in the invention from foreign parts, and the man who takes out a patent for an invention which had previously been discovered by somebody else, it is most material to consider what is meant by being known in the realm—being known in England. Here, again, we must have recourse to authority, and also must consider what the principle is that is to be deduced from the authorities. When you say a thing is known to the public and part of common knowledge, of course you do not mean that every individual member of the public knows it. That would be absurd. What is meant is that if it is a manufacture connected with a particular trade, the people in the trade shall know something about it; if it is a thing connected with a chemical invention, people conversant with chemistry shall know something about it. And it need not go so far as that. You need not show that the bulk, or even a large number, of those people know it. If a sufficient number know it, or if the communication is such that a sufficient number may be presumed, or assumed, to know it, that will do. Now how are they to know it? They are to know it by being told of it, or informed of it in some way. You may show that they
557] *knew it, by showing that the trade had commonly used it. That is the best evidence you can have. You may show the thing was known because it was used and brought into practice, which is a case I have not now to consider. But you may show they knew it in another way—that it was published, or made known to the public. I use the word "published" in that sense. How made known to the public? It has been held that if it is in a specification, certainly in a modern specification, which had been enrolled in the Patent Office, and not published besides, that will do. And it has also been held that, as a common rule, if the description has been printed in England, and published in England, in a book which circulates in England, that will do. But, after all, it is a question of fact. The judge must decide, from the evidence brought before him, whether it has in fact been sufficiently published to

come within the definition of being made known within the realm.

The cases cited may be rather used as illustrations of what will amount to sufficient evidence than as deciding anything in principle, beyond this, that it must be sufficiently known. There are not many cases which it has been necessary to refer to. But one or two are important. In the case of the *Household Coal and Iron Company* v. *Neilson* (1) the question was, What was the effect of publication in a book?—and Lord Lyndhurst says: "If the machine is published in a book, distinctly and clearly described, corresponding with the description in the specification of the patent, though it has never been actually worked, is not that an answer to the patent? It is continually the practice on trials for patents to read out of printed books, without reference to anything that has been done." When he says "in a book," he means published in this country. Lord Brougham says: "It negatives being the true and first inventor, which is as good as negativing the non-user. The book that is generally referred to is the Repertory of the Arts and Sciences. It must not be a foreign book, but published in England." Therefore the decision comes to this, that in an ordinary case of a clear description of the invention in a book published in England, you will presume that it comes to the knowledge of, at all events, that portion of the public *interested in the subject-matter of the invention; [558 and unless you can explain that, or get rid of it, that is sufficient evidence to destroy the patent. But that, again, must be taken with reference to the facts of the case.

In *Stead* v. *Williams* (2) the point came before the court in a different way. Lord Chief Justice Tindal, in giving judgment, said: "On a full consideration of the subject, we have come to the conclusion that the view taken by the defendants' counsel is substantially correct; for we think, if the invention has already been made public in England, by a description contained in a work, whether written or printed, which has been publicly circulated, in such case the patentee is not the first and true inventor within the meaning of the statute, whether he has himself borrowed his invention from such publication or not; because we think the public cannot be precluded from the right of using such information as they were already possessed of at the time the patent was granted." See how carefully it is put there. It must be published in a book made public in Eng-

(1) 1 Webs. P. R., 673, 718 n. (2) 2 Webs. P. R., 126, 143.

land. It must be publicy circulated, and it must give possession of the knowledge to the public.

The same point came before Mr. Baron Parke in *Stead* v. *Anderson* (1), where he said: "Has it been generally known and published? I think those words mean different things. 'Generally known' means known to the public generally, or, at least, to that portion of the public whose attention is turned to such matters. But 'published' means offered or dedicated to the public. Was the invention published or offered to the public to such an extent as that it was generally known amongst engineers and persons likely to take an interest in such a matter?" The case goes to this, that a book must be made public to such an extent as to be generally known among persons practising in such matters. It is, therefore, not merely publication, though, as a general rule, according to the *Household Coal and Iron Company* v. *Neilson* (2), when you say a book is published, and nobody contests it, you assume that several copies have been printed and circulated, unless somebody asserts the contrary. But, as regards the law, you must go a step fur-
559] ther. Does that doctrine, therefore, apply *to a case of this kind? There is one copy of the book which is all that has ever been printed or published, and that copy of the book was always kept in the back parlor of the bookseller's shop, and never was seen, as far as the evidence went. Would that satisfy the doctrine? Clearly not. Even although a book was published, and, in the technical sense, published in England, it does not satisfy the conditions; it has not become part of the public knowledge; it is not knowledge in the possession of the public. And, therefore, if in the cases I have cited the patentee had given evidence to show that the day after the publication in England of 500 copies, 499 had been destroyed, and the remaining one had been put aside by the bookseller in his back parlor, and never circulated, though if somebody had asked him he would have been willing to sell the book, I am satisfied, from what I have read of the opinion of those learned judges, they would all have decided that that was not made publicly known, so as to be part of the public possession and part of the public knowledge.

But it is said there are cases the other way. As regards that I will first direct my attention to a case before the Privy Council. It is a French case, the name of which is *Heurteloup's Patent* (3). It was an application to the Privy

(1) 2 Webs. P. R., 147, 149. (2) 1 Webs. P. R., 673, 718 n.
(3) 1 Webs. P. R., 553,

Council under a remedial statute, which was this: Where a man invented over again something which had been previously invented, if it were a very meritorious invention, and the Privy Council thought that it was really reintroducing to the public that which had been lost sight of, so to say, they could confirm the patent, and make it good, notwithstanding the prior patent: "This was an application under the 2d section of the statute to confirm the letters patent granted on the 22d of May, 1834, to the petitioner, Baron Heurteloup, for improvements in certain parts of certain descriptions of firearms. There being no evidence of user of part of an invention contained in a published book, letters patent for such invention will be confirmed." Now it is to be observed that that is not an absolute decision that what had occurred would avoid the patent. I think it would have been within the province of the Privy Council to recommend a confirmation, even if they had thought the case fairly open to doubt. Confirmation is the *object of the [560 application. It is not necessary to infer that they thought it clear; but inasmuch as it would save the applicant litigation, I think they might have reasonably advised the Crown to confirm it, even if there was a doubt raised as to the validity of the patent. But, even assuming the other view to be correct, for unfortunately in these cases we do not know the grounds on which the learned judges proceeded, there being no judgment, still I think the case does not militate in any way against the authorities to which I have referred, because there was in that case uncontradicted evidence of publication in the sense of being known to the public.

The material facts, so far as it is necessary to state them, were these: It was said that one Valdahon had taken out an invention, which included part of the invention of the applicant. Valdahon had taken it out in France. It was not known in England otherwise than by the introduction into England of books printed and published in France containing a description of the invention. Now that statement, unexplained and uncontradicted, was equivalent to a statement that many books or several books had been in England, and been freely circulated there, because it was known in England by the introduction into England of the books, and that was verified by the affidavit of the petitioner. In addition to that, there was an affidavit by the Keeper of the Printed Books of the British Museum, stating that in 1832—that is, two years before—twenty volumes of a French work, containing an account of expired patents, published under

the direction of the government, had come into the museum, in one volume of which the specification of the French invention was contained. That was two years before. I have no doubt that that book was in the British Museum catalogues. Of course I cannot say it was; but we know that, after two years, it would have been in the catalogue, and in fact long before; and there was nothing to show that it was not read or used; and in the absence of evidence to the contrary, the presumption was the other way. We have the fact that there were several books introduced into England, and that there was one book in the Public Library of the British Museum. On those facts unexplained, it would have been a fair inference to have come to the conclusion that the in-

561] vention of *Valdahon had been publicly known so as to be a part of the possession of the public as public knowledge.

The other case to which I was referred is the case of *Lang* v. *Gisborne* (1). There one De Brettes had published what the then Master of the Rolls held to be a description of the same invention. It was published in Paris in the latter part of December, 1857; that was more than two years before the patent, which was a patent of 1860. It was sent over to this country, and three copies were sold—one in the month of December, 1857, and that is more than two years prior—to Professor Wheatstone, a man acquainted with the subject of the patent. Then one, on the 6th of May following, was sent to the Public University Library at Cambridge, again more than two years before the patent; a third to Dr. Richardson at Newcastle; and a fourth to some gentleman in March, 1859, that is, more than a year before. So that all four books were sold previously to the provisional and complete specification of the plaintiff's invention.

Besides, others had been sold by M. Bailliere, in Regent Street, and the book had been almost invariably in stock, and that for a period of upwards of two years before the patent. I should have had no hesitation in coming to the same conclusion as my predecessor, that under those circumstances there had been such a publication as to make it part of the public stock of knowledge, and that, therefore, the patent was bad. But it is said there is a *dictum* in that case which carries it rather further. I am not sure that it does, and I am by no means positive as to the meaning of the *dictum*. It is not of very much consequence, for Lord Romilly does not lay down a principle. He says (2): "I am, however, of opinion that a publication takes place

(1) 31 Beav., 133. (2) 31 Beav., 135.

when the inventor of any new discovery, either by himself or by his agents, makes a written description of it, and prints it in a book, and sends it to a bookseller's to be published in this country. I am of opinion that it is not at all necessary to establish the fact that one volume of that book has been sold; for I think that as soon as an inventor informs the public of what his invention consists, and prints it in a book which he sends to a publisher to sell"—[That does not mean a single book, because it is plain, when he talks of a book published and *sold, that he means [562 a large number of copies which are usually printed and sold. I do not understand him to mean a single volume]—"from the moment that the book is exposed for sale in the bookseller's shop, there becomes, in point of law, a complete publication of the invention."

Now, there is no law on the subject except this, that the judge, on the facts proved, has to come to a certain conclusion. If it were necessary to express an opinion upon that, I should say it must depend on circumstances. It by no means follows, because the book has been printed and published, and sent to a bookseller for sale, that it is part of the public knowledge. Suppose it were proved that the bookseller never did sell any, or attempted to sell any. He says "exposed for sale." Suppose the bookseller had put one volume in his shop window as exposed for sale for one day, and the next day, by direction of the author, destroyed all the volumes, that would not do, and I do not think that Lord Romilly intended that it would. These are general observations, not to be read in that strict literal sense, but in this sense: that, if a man publishes a book, that is a large number of copies, and sends them to booksellers for sale, and they are, for a reasonable time, exposed in the window, so that you may infer the people have known and seen them, and may reasonably so infer, though you do not prove one has been sold—if the other side cannot prove that one has not been sold, you may reasonably infer that some of those books have been sold. If he means anything more than that, I humbly dissent from it; and I say that my decision is supported by the previous decisions to which I have referred, because I am clear that, if it were shown that no copy had ever got into the hands of the public, and the public knew no more about it than seeing the back of the book in the bookseller's window, and every copy could be accounted for, and that none had been sold though exposed for sale, that would not be a sufficient publication

to avoid a subsequent patent. So much for the law on the subject.

What are the facts? It is stated that on account of the civil war in America, or some other reason, Mr. Plimpton, who had patented this invention in America in 1863, or some similar invention, for I have not got the patent, did not attempt to take out a patent in this country. But in 563] that same year, 1863, the Commissioners *of Patents in the United States published in the usual way a notice of the patents taken out in the United States; and their usual way—perhaps not the most convenient one, but the way they adopt—is simply to publish what are called "the claims." Now it is just as well to know what a claim is. Mr. Hemming mentioned an authority to the effect that really a claim in a patent is not a description of the thing patented, but it rather works as a limitation or, to some extent, one might almost say, as a disclaimer. It is very well explained in *Kay* v. *Marshall* (1). Lord Cottenham, in giving judgment in that case, says: "What follows is merely the claim, not intended to be any description of the means by which the invention is to be performed, but introduced for the security of the patentee, that he may not be supposed to claim more than what he can support as an invention. It is introduced, lest in describing and ascertaining the nature of his invention, and by what means the same is to be performed (particularly in the case of a patent for an improvement), the patentee should have inadvertently described something which is not new, in order to render his description of the improvement intelligible. The claim is not intended to aid the description, but to ascertain the extent of what is claimed as new."

I take that definition from that great judge to be correct. Still they published only the claim. I suspect the reason is that it is the shortest way of giving notice to the public that there is a patent relating to the subject-matter. That is all the public do know, and the public can then go to the Patent Office and get a complete description. The meaning of these lists is to give notice that there is a patent relating to the matter. They know perfectly well what the meaning of a claim is, and it is not intended that the public shall from the copy of the claim be able to make the invention. However, these communications from the Commissioners of Patents in the United States are communicated to the English Commissioners of Patents, and are published in their journal, and they are also communicated to an American periodical or

(1) 2 Webs. P. R., 36, 39.

newspaper called the Scientific American; and the editor of the Scientific American, it appears, is very often in the habit of adding to the claims a short summary of what the invention consists, *according to his view. It is very short, [564 and perhaps not always very accurate. It is not intended to fulfil the office of a specification, but its object is, as far as I understand, to explain a little further than he thinks the claim does what is the subject to which the invention relates; and in the case of this particular patent there was such an addition, comment, or summary by the editor in the Scientific American, which he distinguishes from the claims by putting it within brackets; and anybody acquainted with the Scientific American, or accustomed to read it, would know that that latter portion was something added—not furnished by the Commissioners of Patents, but added by the editor, or some other person who had control over that journal. In the particular instance, as I said before, that has been added, and, therefore, there was in the Scientific American, first, a copy of the claim to Mr. Plimpton's American patent, and, secondly, this comment or summary by the editor, or writer in the journal who undertook that part of the journal.

This was sent over to England a long time before 1865. A copy of it has been shown to have been in the Patent Office Library for a considerable period, and to have been on the table in the public room of that library. That means this: The Patent Office Library is a library open to the public, and the books would be all placed in a room to which the public have access, which is a large room, but unfortunately the books have outgrown the space allotted. The public room has long been full, and books which arrive now, if they are of very great importance, are put into the public room, and others are withdrawn from the public room to make room for them. If they are not of great importance they are put into all sorts of little rooms off the public room, to which the public have no access; and though they are sometimes called for, and are in that sense in the public library, so that anybody who knows they are there can ask for them or obtain them, they are not practically, in the same sense, open to the public, as the books in the general library are, which anybody can get down from the shelves and look at. It is admitted in this case that nobody can make the Newton skates from this letter-press description in the Scientific American. About that there has been no contest.

565] *But there is a book published by a Mr. Jewitt in the United States. It was a private enterprise of a private American citizen, who took upon himself to publish some of the drawings attached to American specifications. Judging from the book, with which I was not personally acquainted till this case, he seems to have selected one drawing from each specification. He published this with the title, that it was a book containing the drawings referred to in the patents mentioned in the reports of the American Commissioners. So everybody who took the book knew what it was, and he distinguished the drawings by a number, which anybody acquainted with the book could see at once was the number of the patents. This book of Mr. Jewitt's being published from time to time, as the patents came out in the United States, contained a drawing which was obviously only one of several drawings attached to the patent of Mr. Plimpton which he had taken out in the United States; and the book so containing the drawings was apparently published and sold in the United States, but not published or sold in this country.

Mr. Jewitt, however, with that liberality for which I believe, as a general rule, American publishers are distinguished, sent to the Patent Office Museum, as a present, a single copy of the volume containing this drawing, and it arrived at the Patent Office Library on the 20th of July, 1865. That has been proved to my satisfaction.

When it arrived, the assistant librarian marked the date of its arrival in the book in pencil. He has been called, and has verified his mark; and he tells us that he took it first into the librarian's room, who ought in due course to have entered the book in the list of books in the library. It is not a catalogue, but a list of books. Two lists are made out. As soon as a book comes into the library by donation, it is entered in the list of donation books; and as soon as a book comes in by purchase, it is entered in the list of books purchased. But as soon as any book comes in, it ought to be entered in one or the other of those lists. There is a reason for that, because the catalogue is only made up at long intervals of time, and it is a catalogue of something else than the mere titles of the books, and is a very troublesome thing to make. The officials at the office
566] have quite enough to do, without *continually making up the catalogue; and therefore it is postponed, and they have a list of books, because the catalogue is not made up except at some considerable intervals of time. But unfortunately, or fortunately, I do not know which, for it depends

on what view is taken of the result of this case, the book was not entered in the list of donation books in the library; nor was it entered, nor could it have been entered, in any other book, and it was not in the catalogue. Nobody who knows anything about the Patent Office knew of it. Then the book was taken, there being no room in the public room, to one of these small private rooms, it not being a book of sufficient importance to displace for it one of the books in the public room; and, for aught I see to the contrary, there the book remained untouched, and unread, and unlooked at till the year 1875. The inference I draw is, that that was really the case; and the reason I draw that inference is, this suit being instituted in the year 1875, a motion for an injunction was made before me to restrain this infringement; and on that occasion the defendant who is himself a patentee of skates, and who is therefore very much interested in the matter, and who of course had employed patent agents, and legal advisers, and all that sort of thing, did defend himself on the ground of prior publication; and the only prior publication that he could produce at that time, that is, March, 1875, was this copy of the Scientific American, and a copy of the Commissioners' Journal, which contained less than is contained in the Scientific American. Neither he nor his advisers, nor, as far as one can tell, anybody acquainted with skates, had ever heard of this book containing the drawing in question. It was discovered afterwards, though how or when exactly I do not know, but certainly some time before Christmas, 1875. My inference is, that it was not known to any one interested in these matters, still less to the public at large, till after March, 1875.

Now, I ask any one possessed of ordinary common sense, can it be considered to have been so communicated to the public as to become part of the common stock of public knowledge? Even assuming, as I do for this purpose assume, that an ordinary workman could have made the invented machine from a perusal of the letter-press, and upon looking at the drawing together, still we must recollect that there was nothing to tell anybody that there was *such a drawing in the library of the Patent Office [567 at the date this patent was taken out, on the 25th of August, 1865. It was never entered in any book in that library; it was not on the public shelves accessible to the public; it was, as I have said before, in this private room; and we have the additional fact that even ten years afterwards, when these matters had become of such public interest that a great number of patents (I am told upwards of fifty) have

been taken out, no one is shown to have known of it, and there is a presumption that no one acquainted with this had then known of it because the defence of "publication" was taken in March, 1875. It does appear to me, sitting as a jury, that I should be wanting in common sense if I came to the couclusion that the existence of this book on the shelf in a private room in the Patent Library—private in the sense of not being accessible to the public, though public in the sense that if anybody had by accident known of it he could have sent for the book—would be such a publication as to deprive the man who first made it known to the world of that merit—the only merit so far as the importer is concerned,—which consists in making known a useful invention to the public. Therefore, on the question of novelty, I should give a verdict for the plaintiff on this ground alone.

The second point is this: Assuming that the book was publicly known, or at least so far publicly known as to be known to all interested in these matters, the defendant alleges, and the plaintiff denies, that the letter-press and drawing together do contain that sufficient description which is necessary to enable a workman of ordinary skill to make the patented machine. As to that, again, one must consider what the law is. First of all, what is required as regards prior description? I should have thought, independently of authority, that no prior description ought to invalidate a patent, unless you could make the thing from the description. I mean unless a person of ordinary skill in the trade could make it from the description. But it has been alleged that something less will do. As I read the authorities, that is not so.

The question has been before the House of Lords in the case of *Neilson* v. *Betts* (1). The judgments of Lord West-
568] bury and Lord *Colonsay come to this—that the description in the book must be equivalent to a specification. I may say that this is entirely in accordance also with the case of *Hill* v. *Evans* (2), and the case of *Betts* v. *Menzies* (3); and even if I differed from them, which I do not, I should be bound by those decisions. On the other hand, there is a decision of *Betts* v. *Neilson* (4), which says that less will do: that the principle having been disclosed, although a workman could not make the machine (that is, the substance of it), that would be sufficient to avoid the patent. All I can say is, that I do not think that is fair to a patentee, and I should not have so decided had the matter been *res inte-*

(1) Law Rep., 5 H. L., 1.
(2) 4 D. F. & J., 288, 300.
(3) 10 H. L. C., 117.
(4) Law Rep., 3 Ch., 431.

gra: it is not *res integra*, and I have no right to depart from what has been laid down by the House of Lords and the Court of Appeal in the three other cases. Now, what is the meaning of it being a sufficient specification? Upon that there has been a very great deal of authority. Judges have stated it in different ways, no doubt, but I do not think there is much difference in substance.

In the first place, it is plain that the specification of a patent is not addressed to people who are ignorant of the subject-matter. It is addressed to people who know something about it. But then there are various kinds of people who know something about it. If it is a mechanical invention, as this is, you have first of all scientific mechanicians of the first class, eminent engineers; then you have scientific mechanicians of the second class, managers of great manufactories, great employers of labor, persons who have studied mechanics—not to the same extent as the first class, the scientific engineers, but still to a great extent—for the purpose of conducting manufactories of complicated and unusual machines, and who therefore must have made the subject a matter of very considerable study; and in this class I should include foremen, being men of superior intelligence, who like their masters would be capable of invention, and like the scientific engineers would be able to find out what was meant even from slight hints, and still more from imperfect descriptions, and would be able to supplement, so as to succeed even from a defective description, and even more than that, would be able to correct an *erroneous description. That is what I would say of [569 the two first classes, which I will call the scientific classes. The other class consists of the ordinary workman, using that amount of skill and intelligence which is fairly to be expected from him—not a careless man, but a careful man, though not possessing that great scientific knowledge or power of invention which would enable him by himself, unaided, to supplement a defective description, or correct an erroneous description. Now, as I understand, to be a good specification it must be intelligible to the third class I have mentioned, and that is the result of the law. It will be a bad specification if the first two classes only understand it, and if the third class do not. I do not think when the cases come to be examined, there is really any difference between the judges on this point. Their language differs, but I do not think the cases differ. I will refer to the case of *Morgan* v. *Seaward* (1), where I think it is put by Mr. Baron Alderson

(1) 1 Webs. P. R., 174.

as well as it is put anywhere, if I may say so: "It"—that means the specification—"ought to be framed so as not to call on a person to have recourse to more than those ordinary means of knowledge (not invention) which a workman of competent skill in his art and trade may be presumed to have. You may call upon him to exercise all the actual existing knowledge common to the trade, but you cannot call upon him to exercise anything more. You have no right to call upon him to tax his ingenuity or invention." Of course that is open to the observation that the meaning of the word "invention" may differ to different minds, and it is sometimes impossible to draw the line between perception and invention. We had an instance of that in the present case. One man may see from a drawing that which ninety-nine men out of a hundred cannot see. The witness Mr. Hulse stated he had a peculiar faculty for seeing from a drawing things other people did not see, and he likened it to the man who could read music at sight—could read a piece of music he had never seen before, as compared to the ordinary mortal who enjoys no such privilege. But again, as I said before, some people might have said that what he thinks is perception is invention. In fact, he describes it as intuitive perception, a peculiar power. Many people would call that 570] the *power of supplementing by invention what the drawing disclosed to ordinary persons. It is quite impossible to say, without considering the concrete, that is, without looking at the subject-matter in respect of which you have to decide—it is quite impossible to say, in the abstract, what is invention and what is perception. It is therefore, I think, to be decided by the jury, under the direction of the judge; or if there is no jury, by the judge alone, what, having regard to the subject-matter, is an exercise of invention or an exercise of perception. So much for the law. Again, I may say, and this bears on another branch of the subject, that that is important as to another objection, which I should like to dispose of at once, namely, what the specification ought to tell. First of all it ought to tell the workman how to do it; but it need not tell him every detail. Mr. Baron Alderson (1) says this: "Now, a workman of ordinary skill, when called to put two things together, so that they should move, would, of course, by the ordinary knowledge and skill he possesses, make them of sufficient size to move. There he would have to bring to his assistance his knowledge that the size of the parts is material to the working of the machine. That is, within the ordinary

(1) 1 Webs. P. R., 176.

knowledge of every workman. He says, 'I see this will not work because it is too small,' and then he makes it a little larger, and finds it will work: what is required is that the specification should be such as to enable a workman of ordinary skill to make the machine; with respect to that, therefore, I do not apprehend you will feel much difficulty." Therefore he does not mean that the man is to shut his eyes, and copy what he sees before him; but he is to do it in an intelligent manner, and when he has made it according to the specification, and sees it will not work, and sees by the ordinary knowledge of his trade what is to be done to make it work, he is to make it work; and if the specification does not mislead, and contains enough to enable the man to do that, then it is sufficient. The other cases upon the subject are numerous. It is sufficient to say that, in my opinion, they do not conflict with what Mr. Baron Alderson lays down in *Morgan* v. *Seaward* (1).

I have now to decide upon very conflicting evidence, whether *or no the workman I have described could [571 have made this machine from the combination of the letter-press in the Scientific American and the drawing. First of all, let us consider again what the workman would know. He would know that this was a copy of two claims. I have already shown, from the luminous exposition of Lord Cottenham, that a claim is not a description of an invention, but a thing put in for a very different purpose. He would know also, when he looked at the letter-press and the drawing, that the drawing referred to in the letter-press was not the drawing he had to deal with, because he would find there were letters in the letter-press not to be found in the drawing, and at least one letter in the drawing not to be found in the letter-press. He would therefore come to the conclusion that, though he had before him a drawing belonging or referred to in the American specification, he had not the drawing to which the letter-press referred. He would then find a note of the editor of the newspaper, and if he was acquainted with the Scientific American, he would know that the note, according to his practice, attempted to give the substance of the specification as distinguished from the claim. It does appear to me that, with that knowledge before him, he would attach more importance probably to the note which was to describe the substance of the specification than he would to the drawing. He would also know that it was not intended from the letter-press alone to enable him to make the machine, and therefore he would have to

(1) 1 Webs. P. R., 174.

find out from a thing not intended for a specification or description what it was. The meaning of that observation is this: When you put a specification in a workman's hands, he is told there is something that can be made from it, which will be useful; but when you put into his hands a mere notice to the world that there is such a patent, he is told that nothing can be made from it, for the meaning of the notice is not to enable him to make it, but to tell him where to find instructions to make it. He comes to that with a different view, and he finds a drawing, not the drawing in the specification. I think most ordinary workmen would not try to make it out, and that it would be a very extraordinary workman who would attempt it.

But suppose he did try, what would he find next? Here I come to the difficulty to which I have adverted more than 572] once in the *course of the argument, that having acquired during the course of this long discussion a very considerable knowledge as to the nature of and the mode of working this invention, I have to put my mind in the state in which this workman's mind ought to have been in the year 1865, when nothing at all was known about the subject-matter, either of the mechanical arrangement to which I have referred, or of roller skates at all, as distinguished from common parlor skates, which were, I believe, known. I must consider that the workman, though a skate maker, would really, from his knowledge of ordinary common skates, know very little about it. That is, that there was no trade knowledge to work upon.

In addition to that, I find this in the Scientific American, that there are several words used the meaning of which was not known to me before this case, and, as I gather from the evidence, not known to any one in England. Whether they are in fact American terms known in America, or whether, as regards one or more of them, they have been used by this inventor in a new sense—a sense sufficiently explained by his drawing and context; or whether he himself did not use them for the first time, I know not—I have no evidence before me. It may be that he first used them in this sense, or it may be it was a sense known in the United States at the time to mechanicians. That I have no evidence of, and I I have no knowledge of my own to supply that evidence. Thus the workman would have found in the letter-press several words not known to him, having no trade meaning, and which would convey no meaning to his mind. He would first find the word "runners." That word "runners" gives me, from the evidence, no meaning at all in 1865. What a

runner was, as belonging to a skate, I take from the evidence, nobody knew in 1865. It was an entirely new term in England, whatever it may have been in America. He would then find that something was to be "turned," "cramped," or "adjusted." Now, whether the verb to "cramp" was part of the American dictionary, in that sense, in the year 1865, I know not, but it was not part of the English dictionary in that sense. It had no mechanical meaning, and upon that there has been no conflict of testimony. Then he would find another thing. He would find the word "cant," which *is put in with "turning." As to the [573 word "cant," there has been a great deal of question; but the conclusion I have come to is, that what was said by one of the witnesses for the defendant is correct, that it is a word of wide meaning; that it was not confined to one particular motion in the lateral direction, as distinguished from a motion in the upward or diagonal direction; that it was a term of wide meaning, not a term of definite use in mechanics; not a term in common use at all, but a rare and uncommon term, and one the meaning of which no ordinary workman would, by any reasonable attribution of knowledge, be supposed to be acquainted with. As to that there is some doubt, for there is a great conflict upon the evidence.

Then, in addition to that, he would find this; and now he would come to something which perhaps he thought he could understand. He would find in the editor's note that which comes to a short account of the specification, which I say would be more a guide than the claim. He would find that it was an improvement in the attaching of rollers, &c., "whereby the former are made to turn or cramp like the wheels of a wagon"—(As I said before, he would not know what "cramp" meant at all)—"and facilitate the turning of the skate, there being two pairs of rollers to each skate." I think myself, and I have the evidence in my mind when I say so, that he would infer from those words, "like the wheels of a wagon," that they would turn round a vertical axis. Upon that the evidence stands in this way. We have the evidence of Mr. Bramwell and Mr. Imray, two eminent mechanical engineers, who say that they would have so understood it. Of course this is mere matter of opinion. Those gentlemen must be in the same difficulty that I am in myself, because when they gave the opinion they knew all about it, and they have to consider to what conclusion they would have come if they had not known all about it; and it is a very difficult mental process to say what you would have thought of a description, the meaning of which you

know, if you had not known the meaning. But that is their opinion. On the other hand, three experts say—and on these matters I do not count whether they are two or three, although I should be very glad if there was a rule that in patent cases neither side should call more than two experts
574] —three experts say it does not convey *to their mind any such notion. They do not know much about "cramp" either, but they think the words "made to turn like the wheels of a wagon" do not refer to the mode by which they are made to turn—that is, the mechanism of the turning, but refer to a description of the motion; that is, that they are to move in a similar direction, or with a similar motion, but not that the mechanism is similar. Both sides have seen drawing, and both sides tell you that in 1865 they would have arrived therefore at opposite conclusions. If I am to look at it grammatically, I think the grammar is rather more in favor of the plaintiff's experts than the defendant's experts. It is not that the former will "turn like the wheels of a wagon," which I should have thought would have been the natural expression if you were describing the motion, but that they are made to turn. I do not rely much on that, because I cannot say it is clear from the grammar either way. It is ambiguous, it is capable of both interpretations, and therefore you have these gentlemen, with an ambiguous form of words before them, arriving at the conclusion, that if they did not know what they know now, they would have arrived at the conclusion which happens to be most favorable to the side on which they have been called. I do not mean to reflect on these gentlemen, but there is on these mere matters of opinion a certain amount of bias in the minds of the experts towards the side on which they are called. It does so happen in this case, as generally happens in these matters of mere opinion, that the experts on one side are in favor of their side, and the experts on the other in favor of their side.

Now I have got something in this case to assist me which we do not generally get. The intelligent workman was produced, and I was very anxious to see what he did and what he thought of it. And when I say the "intelligent workman," I really mean that, for he was a very intelligent workman. I am by no means prepared to say that he is an ordinarily intelligent workman. I wish I could say so. I should be delighted to be able to say that the average of our ordinary skilled workmen were at all equal to Mr. Edwards. He is a very intelligent man, and, indeed, I shall have to make an observation upon that which I may as well make

at once—that I think he was picked out for his intelligence; and the reason I say so is this: *Somebody on the [575 defendant's side went to a Mr. Pomeroy, the manager of Messrs. Holtzapfel & Co., who have been described as the makers of complicated machines—principally lathes and so on—and certainly told him something. What he told him I do not know. He must have told him, in some shape or other, that he wanted a skate made according to the letter-press in the Scientific American and the drawing. Whether he told Mr. Pomeroy exactly what it was wanted for or not I cannot tell. Most likely Mr. Pomeroy would ask what it was wanted for, and would ask something about it; but as to that I do not know. When Mr. Pomeroy got the sketch of the drawing, he sent for a workman to make it. What sort of a workman would he send for? It was not a very easy thing to make; that anybody can see. He had got before him a manifestly imperfect description, for the reasons I have given. He therefore would not send for the most stupid of his workmen, and I think he would send for the most intelligent of his workmen, the man who would be most likely to make it from the drawing. I think, therefore, independently of what I have seen of Mr. Edwards, that he was a most uncommonly intelligent man, and that he was selected for his intelligence by the manager of Messrs. Holtzapfel's works. But that is mere inference. What does this intelligent workman do? He is asked to look at the description. What did he think it meant? He says he read, "Whereby the former are made to turn like the wheels of a wagon," to mean exactly what Mr. Bramwell and Mr. Imray said he ought to take them to mean, and he said he found out it would not do, so he left it out. His words were: "I departed entirely from the instructions as to making the wheels turn like the wheels of a wagon. It occurred to me that the direction to make the wheels turn like the wheels of a wagon was not correct, and I applied my intelligence to devise something else, and I did by my own intelligence devise another plan without departing from the drawing." So that this intelligent workman, reading it for the first time, came to the conclusion that what was an abstract, or a condensed statement, of the specification was wrong, and looking at the drawing he had sufficient intelligence, as he describes it, but, as I should describe it, sufficient inventive power, to correct the mistake.

*If I understand the rules of patent law, you must [576 not mislead people by telling them to do something wrong, and leaving them to find out the mistake. Therefore, if this

were really the meaning of the letter-press—which, upon the whole, I think it is, though I say I am in great difficulty about it, but I am confirmed in my view by what the workman did—then I think it is clearly insufficient, because it tells you to do something which cannot be done to make the thing useful, though he did, by his own intelligence, in looking at the drawing, find out what was required. You must not give people mechanical problems and call them specifications. You may set to a dozen engineers a mechanical problem, and perhaps eleven out of the twelve will find it out; you may set to a dozen selected workmen a mechanical problem, and perhaps, of that dozen, three-fourths will find it out; but that is not the meaning of a sufficient specification to make a patent article, and, therefore, having had the intelligent workman before me—and a very intelligent workman he was—seeing how he read it, I think that the reading proposed by Mr. Bramwell and Mr. Imray is the more likely reading to have been adopted by the ordinary intelligent workman, than the reading proposed by Messrs. Cowper, May, and Hulse. But it is said Mr. Bramwell ought to have found it out, and I must say that the cross-examination of Mr. Bramwell on one portion of his evidence was effective. I think Mr. Hemming showed Mr. Bramwell that he had made a mistake as to the mode of turning, which he thought was not possible. But I will assume that he ought to have found it out, and I will assume that Mr. Imray ought to have found it out, as well as Messrs. Cowper, May, and Hulse. What then? That is not the class to which these things are addressed. Supposing these great mechanical engineers had found it out, it would only show they had sufficient capacity to solve this mechanical problem, and nothing more.

There was another witness called, and I am sorry he was called, because the letter-press and drawing were given to him in the middle of the trial. Somebody took the letter-press and drawing to Mr. Botten, who was not an ordinary workman. He had been a workman at one time of his life, but he was one of that superior class who rise to masters. I wish there were more in this country than there are; but 577] anybody who knows anything about *our working men will know that the class who rise from workmen to masters are a very superior class. Now he, having the drawing and the letter-press, certainly made a machine, but he made it, as the other workman did, eventually without the buffer. I will go back for a moment to what Edwards did. Edwards, from the drawing in the first instance, did

not make it quite right. He did something very ingenious, and which, to a certain extent, would have answered the purpose. Instead of making a diagonal axis of metal right through the triangular piece, he pinned it at both ends. He found it would not work, and in order to make it work, he made his pins move—that is, free at both ends—and then it worked. And after that, how long after he did not recollect, but some time after—he found out the actual and best mode of doing it, namely, by putting his pin right through. That is what he did, but he never found out the subordinate part of the invention—that is what I have called the buffer or moderating spring. That he never found out at all. And as to that he says, fairly enough, "I left it out because I did not understand what it was, and there was no description of it in the letter-press." He made the best machine he could, but he did not understand the drawing any more than the letter-press. He misunderstood both, and made it so far wrong that he left out that which was certainly not an essential portion of the invention, in the sense that the invention would have been a good workable invention without it, and in the sense that in my opinion anybody who made the skate without the buffer would be infringing. Still he did make it without the buffer. The second man, Mr. Botten, also made it without the buffer. He could not make it out, and he made it, in the first instance, not according to the drawing. He added an invention of his own, and not an immaterial invention. He was not only a man who, I think, was capable of inventing, belonging to the superior class of workmen, from whom he had emerged, but he actually did invent and put into that first model things not found in the drawing at all. Then he was asked to make a larger one. On this point I have already remarked, and I do not wish to say anything at all unpleasent to Mr. Botten. There was a little exaggeration and a little forgetfulness; but I think he was stating what he believed to be true. *Being asked to make his first model larger, [578 he improved it and made it much better, and his second model is a much better model than the first. He altered some parts, and he improved other parts by making the wheels lock on the foot-stand; and he not merely copied his own model, but he improved it. So much for the actual operation. Now, taking all this together, can I say that this was such a description as satisfies the exigencies of the law, that it was a fair specification from which an ordinary workman could make the machine? I think I cannot. And on this point also my verdict on the issue will be in favor of

the plaintiff, though, for the reasons I have specified, it was not actually necessary to decide it.

I now come to the next issue—the sufficiency of the specification. On this part of the case two objections were taken. It was first of all said, that the specification was ambiguous—that is, ambiguous in the sense that a person of ordinary common sense acquainted with the subject-matter would not understand it. That has been the definition of ambiguous, given as regards specifications. What is this specification? I am at a loss to see the ambiguity. I have heard the argument, but, with one exception, I never saw a better specification; and as regards the roller skate itself (I am not now speaking of the runner skate), anything more complete in the shape of description, or in the shape of directions, I think I have never seen at all. Upon that the opinion of plaintiff's experts was not contradicted by the opinion of the defendant's experts. There was not a single person produced before me who said he did not understand it; and nobody alleged there was this ambiguity, except Mr. Hulse. He may have found an ambiguity which did not occur to anybody else. The ambiguity, as far as I understood him, was this—that he said he could not tell whether there was one invention claimed, or four inventions claimed, by the first claim. It only applies to the first claim: "Applying rollers or runners to the stock or foot-stand of a skate is described, so that the rollers or runners may be cramped or turned, so as to cause the skate to run in a curved line, either to the right or left, by the turning, canting, or tilting laterally of the stock or foot-stand." What does that mean? It simply is this: "I made a machine which I have described, and now I will tell you what
579] I *consider new. I consider new the making of skate-runners, or the wheels of skates, or the rollers of skates, or the runners of the skates, to go in a curved line, as I have described, from lateral motion; that is, I have shown you the mode of actuating your wheel, and I have shown you also a regulator, or moderator, or buffer, which will regulate the action produced. This is what I claim." To me it is as plain as plain can be. I see no ambiguity on this point. I think it is unnecessary to dilate further on it.

The second point, on the insufficiency of the specification, was a very singular one. It was a very small point, and a point that, as far as I can see, was only recently discovered. It is obvious it was not discovered very long, because it was not taken by the answer.

It was only by a special order that I allowed the defendant to supply an omission in his answer as to utility, which would have embarrassed him very much in arguing this point. The second claim has nothing to do with the roller skate at all; but it refers to the mode of securing the runners, and making them reversible, as above described. Now the allegation of the defendant is this, that when you have hard ice, and the surrounding atmosphere below freezing point, and you want to skate with these runner skates, your runner must be inclined, so that one edge of the runner shall bite the ice; and it is obvious to any one, when you consider what the skate is, that that must be so. Mr. Plimpton, in cross-examination, admitted it. You can, for soft ice, no doubt, put your runners vertically; and then you can skate, because the foot, by pressure, gets the runners into the ice. But when it is hard ice, well frozen, your runner must be put obliquely, so that it shall present an edge to the ice. And it is said that the specification is bad, first of all, for not telling the reader that the runners are to be placed obliquely; and, secondly, for not telling him the degree of obliquity. Now, it is said the evidence shows that to make a good useful skate you must have a considerable amount of obliquity. I do not mean to say you cannot use it without, but that the best form of skate known would have at least twenty degrees of obliquity—that is, the runner would be sloped to the extent of making the angle of twenty degrees to the vertical line.

*The law on the subject is perfectly well settled. [580 A specification is bad if the patentee has described something which will be useless as an integral part of his invention; and a specification is also bad if the patentee, at the time he takes out his patent, knows of a more convenient and better form of performing the operation and conceals it from the public, and puts into his specification a less convenient and worse form. Thus, if it were a chemical patent—if, at the time of taking out the patent, he knew of cheap ingredients which would make the patented article, and also knew of dear ones, if he suppressed the cheap ones, and only named the dear ones, that would invalidate the patent.

In this case it was not denied, notwithstanding the opinion of some of the experts, yet, looking at the opinions of other experts, and the cross-examination as to the working of the specification, it was not denied by Mr. Hemming, in his argument, that a reasonable man trying to understand this specification would find out that the four angular edges

were to be successively used and successively presented to the ice, whether they were presented obliquely——

[*Hemming:* Would your Lordship allow me to say, that I considered there was an ambiguity? I said that many would find it out, and then I argued it on the assumption that the construction was taken against us. I did not wish to abandon the point.]

I will assume that the point has not been abandoned. I thought it had, but it does not matter. It was argued on the assumption that it was not worth presenting to me in a detailed way. I think it is beyond argument. It is quite true that Mr. Bramwell said something that looked the other way, and it is quite true that Mr. Cowper, and I think also Mr. May, said the same, though on cross-examination they found something was different. Mr. Cowper on cross-examination, on being asked what meaning he gave to the specification between lines 20, was obliged to say he thought the patentee had made a mistake. Mr. Bramwell said something of the same kind. On the other hand, we had the inventor himself, who intended to make it clear, who certainly knew they would be oblique on hard ice, and he said he thought he had so described it; I mean Mr. Newton. Mr. Imray not only said he thought it quite clear, but pointed 581] out why; and Mr. Hulse, the other expert *called for the defendant, not only understood it so himself, but said he thought that, though some workmen would make a mistake—and probably most workmen would make a mistake in the first instance—yet the workman would immediately see it was wrong, and put it right; and he said that if there were people from whom they could get instructions, they would apply; and yet, if there were nobody to instruct them, they would find it out without. Taken, therefore, upon the bare balance of the evidence, and not to be regarded on mere trumpery grounds, or on little bits of fringe —taken on the balance of evidence, the ordinary workman ought to have found it out.

But, after all, it is for me to decide this. Let us see how it stands. There is, first, the drawing of the bottom of the skate—the only thing which shows the runners. There is no end view of the runners, and it was very fairly stated by Mr. Hulse, that a man who saw the bottom drawing would not expect to find out from that whether it was inclined or not. It is a very small thing. It would be very difficult to show it. I do not say impossible, because it might be done by a second or third line; but he said

no workman would expect to find it out from that, and that if you want to give him a proper view, you must give him an end view. The question then is, What ought you to find out from the letter-press? I have no hesitation in saying you ought to find out it was oblique, and was to have a smooth running surface, with angular edges, so that they may be reversed when the inner edges lose their angularity. But what is the meaning of "inner edges?" It is a square thing, and the inner edges must mean the inner edges as regards the ice: "Both edges of one surface have worn, and the runner may be inserted, and two more angular or sharp edges obtained. Then each runner has four angular edges, which may be successively used before the runner will require to be sharpened." Of course, if they are to be successively used, it means they are to be presented successively to the ice, and one is to be used at a time. I myself have no doubt and no hesitation in saying, it being my province to decide, that this does tell any reasonable person, who wants to know what the invention means, that there are four edges successively used, that the runner is to be placed obliquely on the holder, in order to carry out the invention.

*Having got to that, let us consider what the two [582 next objections are. The first objection is an objection—utility. It is said that in order to make the best form of skate, you must have an inclination to the vertical of at least twenty degrees, that it will not be a good skate without you do, though a skilful person might use it—it will not be a good skate. But, as regards utility, the law is very clear, that a small amount of utility will do. There are so many authorities on the subject that I am almost ashamed to mention them, but nothing can be better settled. I will refer, without reading them, to *Neilson* v. *Harford* (1), and the *Househill Coal and Iron Company* v. *Neilson* (2), I might refer to a couple of dozen cases, if necessary, as to utility, and they all show what a very small amount will do. Now it cannot be denied that there is some amount of utility even in the straight skate. If it is quite vertical, it may do for soft ice; but when you find it to be oblique, we have the evidence of the inventor that he skated from zero up to forty-five degrees of inclination. That you could skate at a very small inclination, though I admit not as well as you could at a greater inclination, I think is indubitable; and therefore on that question of utility I am in favor of the plaintiff.

(1) 1 Webs. P. R., 295.

(2) 1 Webs. P. R., 675.

The next objection was this, and it is an objection, as I have said, well-founded in law, if it is made out: the patentee is bound not only to tell the public enough to make the invention useful, but to show the most convenient form of performing it within his knowledge. It was said that Mr. Plimpton knew from practice, that he skated himself, and had seen his daughters and other ladies skate, and that he knew that the skate commonly used was a skate with runners at an angle of twenty degrees to the vertical, and therefore he should have told the public in his specification that the angle should be twenty degrees at least, and that not having told them so the patent is bad. Now the first answer to that is very obvious. Mr. Plimpton is not the patentee at all; Mr. Newton is the patentee. And what the law requires is, that the patentee shall tell the public what he knows. Now, not only is there no suggestion that Mr. Newton knew this, but, as he told us in the box, all he knew about it was the instructions he received from America, which he produced. He said, I am only the patent
583] agent, and there is not a pretence *for saying that he had ever skated with these skates, or knew that they wanted twenty degrees or any number of degrees to the vertical; therefore, the objection in law fails altogether. But even as regards Mr. Plimpton, I do not think it is sufficiently proved. What you have to prove is knowledge at the time. That he knows it now is certain. He has taken out, as I understand, another patent, namely, in 1874, and then only his attention was directed to this point, but it was not got out that on or before the 25th of August, 1865, he knew this. The question is, the state of his knowledge at the time this patent was taken out in 1865; and as I read the evidence, it is not distinctly shown, or sufficiently shown, for me to invalidate the patent, even if it had been granted to Mr. Plimpton, that he knew this on the 25th of August, 1865. On all these grounds, I think that upon the question of sufficiency of specification, my verdict must also be in favor of the plaintiff. The other issues having been found in favor of the plaintiff, there is nothing more to be said than that I find a verdict for the plaintiff on all the issues.

It was arranged that the decree should be suspended in case the defendant should decide on an appeal.

March 2. *Matthews*, Q.C., now moved that the decree might be drawn up.

JESSEL, M.R.: Let it be drawn up forthwith.

Solicitor for plaintiff: *W. Clarke*, agent for Clarke & Howlett, Brighton.

Solicitors for defendant: *Tilleard, Godden & Holme*, agents for Black, Freeman & Gell, Brighton.

The law is the same in the United States: Curtis on Patents (4th ed.), §§ 369, *et seq.*; U. S. Revised Statutes, §§ 4920, 4923.

[8 Chancery Division, 584.]

M.R., March 12, 1876.

*HIRSCH v. JONAS. [584

[1876 H. 102.]

Trade-mark—Injunction.

The plaintiff, a cigar merchant in London, registered a label at Stationers' Hall, which he requested G., the manufacturer at Havannah who supplied him with cigars of a particular description, to affix to each box consigned to him. G. accordingly affixed the label, with his own name as manufacturer, to all boxes so consigned. The plaintiff subsequently discovered that G. was supplying cigars of the same description, and with the same label, to the defendants, who were G.'s agents, and brought his action to restrain the alleged infringement of his trade-mark. On a motion for an injunction against the defendants:

Held, that, there being no evidence of any contract that G. should supply the plaintiff exclusively with that description of cigars, the court could not, on an interlocutory application, restrain the defendants from using the label.

THIS was a motion for an interim injunction to restrain an alleged infringement of the plaintiff's trade-mark.

The plaintiff was a cigar merchant in London, who purchased cigars of a particular description from Joseph Genir, a manufacturer at Havannah, who had supplied him since 1869. In that year the plaintiff adopted a label with a device representing Britannia, and the inscription, "Gloria de Inglaterra," which he registered at Stationers' Hall as his own copyright. The plaintiff then wrote to Genir to the effect that he had secured this device as his own exclusively, so that no one else could use it, and requesting Genir to affix a label with this device to each box of cigars which he supplied to him, and accordingly Genir afterwards used it on all boxes consigned to the plaintiff, adding the words (in Spanish) "of Joseph Genir, Manufacturer of Cigars, of Havannah."

It appeared that for some years Genir only supplied cigars of this description to the plaintiff, but the plaintiff having recently discovered that Genir was supplying the defendants, who were his agents, with boxes of similar cigars, with the brand "Gloria de Inglaterra," brought an action

to restrain them from selling any boxes of cigars having the label affixed, which he claimed as his exclusive trade-mark.
585] *It did not appear that there was any contract between the plaintiff and Genir that that description of cigars should be supplied to the plaintiff exclusively.

Chitty, Q.C., and *T. L. Wilkinson*, for the plaintiff, in support of the motion.

E. Cutler, for the defendants, was not called on.

JESSEL, M.R.: This is not a case in which I shall interfere by interlocutory injunction. It is a case of great singularity. It is the first case of the kind in which a serious attempt has been made to obtain an injunction at this stage of the cause in my court.

The case stated is this: A merchant in London of the name of Hirsch sells cigars like any other merchant. He has a correspondent in Havannah named Genir, who is a maker or manufacturer of cigars. Hirsch is in the habit of buying cigars of him. That is the only connection between them. In the year 1869, Hirsch employed an artist to make a drawing of a lady with a trident and a lion and a ship, and to put on the drawing "Gloria de Inglaterra." He then wrote to Havannah asking Genir to adopt this design as a label for the cigars to be consigned to him, and also stating that he had secured it in some mysterious manner in England, so that no one else could use it. He had, in fact, registered it at Stationers' Hall. Thereupon the manufacturer at the Havannah puts this picture on the boxes of cigars in this way: He puts the description "Gloria de Inglaterra" on the top of the box, and then puts the picture itself at the side, putting on again at the side the "Gloria de Inglaterra" of Joseph Genir. He has put his own name on the top, and on the side he puts "Gloria de Inglaterra of Joseph Genir, Manufacturer of Cigars, of Havannah." That is all the public can see. Therefore, in both labels he claims the cigars as belonging to J. Genir, Havannah. Then when you open the box you find simply the design with the name of the manufacturer. The only representation on the box, as it appears to me, is that the cigars are Genir's manufacture.

Mr. Hirsch says that Genir wrote to him a letter to say
586] that *some one else had asked him to supply cigars with this design, and that he had declined to do so. But there is no contract that Genir will not supply cigars under this label to any one else. If there is such a contract, it must be alleged and proved. I cannot find on the part of the

plaintiff any evidence of any contract with Genir to supply him with goods of that description.

As I understand, the plaintiff simply buys cigars of Mr. Genir when Mr. Genir chooses to sell them. But, as I understand, there is no contract to secure the plaintiff another box of cigars if Mr. Genir chooses not to supply them. I can find nothing to show that he will be injured. He does not tell me he has got any stock of these cigars in hand. If I do not restrain the defendants, who are but the agents of Genir in England, I do not see how it will injure the plaintiff at all. He can get no more cigars, and if he has no stock at all I do not see how he will be injured.

Now the defence is this: "It is our trade-mark. No doubt it was suggested by the plaintiff, but it is ours. We have always used it as ours: we are the agents of Genir. Genir's cigars are genuine cigars of the quality in question. The public will not be deceived, nor will the plaintiff be injured."

On what principle am I to restrain the defendants at this stage of the action I am utterly at a loss to find out. As for the question of trade-mark, the trade-mark of manufactured goods means, I suppose, that the goods are manufactured by the person whose trade-mark it purports to be. In this case the manufacturer is Genir. I can understand a man saying, "I am not the actual manufacturer of goods, but the selector of goods, and my reputation for cleverness and selection is so great, that goods marked with a mark to show that they had been selected and approved of by me will fetch a higher price in the market." If Hirsch had put on the box "Gloria de Inglaterra Havannah Cigars, selected by Hirsch," he might have had a case to prevent other people imitating that. It would show that the cigars selected were approved of by him. If he got a great reputation in that way, I can understand he would have a right of protection for that which indicates to the public that the cigars were selected and approved of by him. That is not his case. There is nothing on the boxes to show anything about Hirsch at all. All he says is *that the trade knows this [587 mark as denoting cigars sold by him, which I dare say it does. It appears to me at present that he has no case whatever, and there is no use my granting an injunction. I do not know whether he may make out a contract hereafter.

In refusing the motion, I shall make the costs costs in the cause.

Solicitors for plaintiff: *Allin & Greenop.*

Solicitors for defendants: *Lumley & Lumley.*

[3 Chancery Division, 587.]

M.R., March 31, 1876.

MAYD V. FIELD.

[1873 M. 73.]

Married Woman—Separate Estate—Liability for General Engagements—Appointment by Will—Cumulative or Substitutional—Satisfaction.

Personal property settled on the marriage of C. W. in trust as she should during coverture by deed or will appoint, and, subject thereto, for her separate use for life, and if she survived her husband (which happened) for her absolutely:

Held, to be bound by her general engagements.

Accordingly, C. W. having in a settlement on the marriage of her daughter L. covenanted with the trustees thereof for the payment to them on her decease of £1,000 to be in trust for L. for life, then for the husband of L. for life, then upon the usual trusts for her children:

Held, that the trustees of L.'s settlement were entitled, on the death of C. W., to stand in the position of creditors in respect of the property comprised in the first settlement.

By the will of C. W. executed under the power of the first settlement, £1,000 was settled upon trusts similar to those of plaintiff's settlement, omitting the husband's life interest:

Held, that this was a case of satisfaction, and that neither L. nor her children took anything additional under the will unless L.'s husband survived her:

Held, also, that dividends received by C. W. after her husband's death, and railway stock representing part of her settled property which was realized after her husband's death, did not pass under her testamentary appointment.

BY an indenture dated the 20th of August, 1856 (being a settlement made on the marriage of Edmund White and Caroline White), certain personal property, furniture, and effects, to which Caroline White was entitled, were assigned 588] to trustees upon trust to assign *and dispose of the same to such person or persons, and in such manner, as Caroline White should during her coverture by deed or will appoint, and, subject thereto, upon trust during the joint lives of Caroline White and Edmund White to pay the income of the trust funds as Caroline White should appoint, and subject thereto to Caroline White for her separate use, and after the decease of either of them, in case Caroline White should survive Edmund White (which event happened), in trust for her, her executors, administrators, and assigns.

By an indenture dated the 3d of August, 1858 (being a settlement on the marriage of the plaintiff, a daughter of Caroline White, by a former marriage, and William Mayd), Caroline White covenanted with the trustees of her daughter's settlement that the heirs, executors, or administrators of her the said Caroline White should within six calendar months after her decease pay to the trustees or trustee for

the time being of that settlement the sum of £1,000 with interest as therein mentioned, and that the said trustees should stand possessed of the said sum upon trust for the plaintiff for her separate use during her life without power of anticipation, and, after her decease, for W. Mayd during his life, and after the decease of the survivor, in trust for the children of the marriage, as W. Mayd and the plaintiff should jointly appoint, and in default of such appointment, as the survivor should by deed or will appoint, and in default of appointment, for the children equally, as therein mentioned.

Caroline White was not described in the last mentioned settlement as a married woman, nor did the settlement contain any reference to her own marriage settlement, nor to the property thereby settled or the power of appointment thereby given.

Caroline White, by her will, dated the 30th of December, 1864, which was expressed to be made in exercise of the power given by the settlement of the 20th of August, 1856, gave the residue of her real and personal estate to her executors upon trust as to £1,000, part thereof, upon the same trusts as were thereinafter mentioned in respect of the one moiety of her residuary estate given in favor of her daughter, the plaintiff, and as to the rest and residue of her said real and personal estate upon trust to pay the dividends in equal moieties to her daughters, Emma Green and the *plaintiff, for their separate use; and after the de- [589
cease of either of them, the testatrix bequeathed the moiety of her estate to such of the children of such daughter as she should by deed or will appoint, and in default of appointment, to the children equally, as in the said will mentioned.

Edmund White died in 1871; Caroline White died in 1873.

The bill was filed by the plaintiff, Lucy Mayd, by her next friend, against the trustees of the two settlements, the surviving executor of the will of Caroline White, the said William Mayd and others, as defendants, for obtaining the direction of the court as to the trusts of the will of Caroline White, and of the settlement of the 20th of August, 1856, so far as the will operated in exercise of the power of appointment by will by the said settlement given to Caroline White.

The principal questions were, whether the property comprised in the settlement of the 20th of August, 1856, was, in the events which had happened, the separate property in equity of Caroline White, so as to be bound by her general engagements, and, if so, whether the £1,000 be-

queathed by the said will in trust as therein mentioned for the benefit of the plaintiff amounted to a satisfaction of the covenant on the part of Caroline White to pay to the trustees of the settlement of the 3d of August, 1858, the sum of £1,000.

There was a further question, whether dividends which Caroline White had received after her husband's death, and certain railway stock which she had purchased, representing the proceeds of some of the furniture comprised in the settlement of the 20th of August, 1856, which had been sold after her husband's death, passed under her will or were undisposed of.

Chitty, Q.C., and *Caldecott*, for the plaintiff: Assuming that the covenant contained in the settlement on the plaintiff's marriage did not operate as an execution of the power reserved to Mrs. White by the settlement on her own marriage, since it referred neither to the power nor to the property comprised in her settlement, still it operated as a general engagement on her part, binding the property subject to the trusts of her settlement, which was in effect her sepa-
590] rate property by reason of *the power enabling her to dispose of it by deed or will: *London Chartered Bank of Australia* v. *Lemprière* (1); *Heatley* v. *Thomas* (2); *Johnson* v. *Gallagher* (3); *Picard* v. *Hine* (4).

It is clear that her will was a good exercise of the power, though made during coverture: *Thomas* v. *Jones* (5). *Willock* v. *Noble* (6) is distinguishable, for there the power was exercisable only in an event which never happened.

This being so, we submit that the appointment by the will is no satisfaction of the covenant, for the limitations differ materially; and in particular, the husband takes a contingent life estate under the covenant which he does not take under the will: *McCarogher* v. *Whieldon* (7).

[Jessel, M.R.: In *Bethell* v. *Abraham* (8) I remember I

(1) Law Rep., 4 P. C., 572.
(2) 15 Ves., 596.
(3) 3 D. F. & J., 494.
(4) Law Rep., 5 Ch., 274.
(5) 1 D. J. & S., 63.
(6) Law Rep., 7 H. L., 580.
(7) Law Rep., 3 Eq., 236.

(8) 1874. March 3.

BETHELL *v.* ABRAHAM.

This was a suit to administer the estate of Richard, Baron Westbury.

By a settlement made in June, 1863, pursuant to articles before the marriage of the Hon. Richard Bethell, the eldest son of the testator, and Mary Florence (afterwards Lady Westbury), his wife, the testator covenanted with the trustee that he would, during the joint lives of himself and Mary Florence Bethell, pay to the trustee the annual sum of £400, which sum it was thereby declared that the trustees should pay to Mary Florence Bethell, for her separate use, without power of anticipation. The testator also covenanted that he would by his will direct his executors to invest in such securities, and in such manner, and with such powers of variation and transposition as he should

*decided that the rule against double portions ap- [591
plied to the extent of the interest on the fund settled upon Lady Westbury and her children under the settlement.]

We submit also that the savings of her separate income, and the railway stock, passed by her will. The power of alienation is an incident of separate estate: *Taylor* v. *Meads* (1); and the railway stock is only the furniture in another shape: *Dingwell* v. *Askew* (2).

Davey, Q.C., for Emma Green and her husband.

Langworthy, for W. Mayd, and the trustees of both settlements, contended that the difference between the trusts was such as to displace the presumption of satisfaction. He referred to *Lord Chichester* v. *Coventry* (3).

Bagshawe, Q.C., and *Decimus Sturges*, for the next of kin of Caroline White (having liberty to attend the proceedings) argued that after Mrs. White became a *feme sole* there was no separate use, and the proceeds of furniture

thereby express, the sum of £10,000, which it was declared that the trustee should hold upon trust during the life of Mary Florence Bethell, to pay the income to her for her separate use, without power of anticipation, and after her death, for her children, as therein mentioned.

The will of the testator was, so far as material to be stated, as follows:

"All my property of every description (except the things hereinafter specifically given) I devise and bequeath to my trustees and their heirs on the trusts hereinafter mentioned."

"For the period of five years, to be computed from the day of my death, there shall be paid quarterly the following annuities . . . . To my daughter-in-law Florence £2,000, for the maintenance of her husband and herself and the support and education of her children . . . . these annnal sums shall be for the separate use of my daughters and daughter-in-law, but without power of anticipation."

"At the end of the five years an account and valuation shall be made of my estate, and the following sums (with proportionate abatement if necessary) shall be paid equally . . . . . To my son Richard's wife and children the sum of £10,000, upon the trusts and for the purposes of the settlement made upon Richard's marriage."

The testator died in July, 1873.

The Master of the Rolls decided that the testator's bequest of £10,000 to his son Richard's wife and children was not a performance of the covenant, and admitted the claim of the trustees of the settlement to prove as creditors for £10,000, with interest at 4 per cent. from the day of the death of the testator, minus such a sum as would have been deducted for legacy duty if the testator had performed his covenant. A summons was then taken out on the part of Lady Westbury, in order to raise the question whether the annuity of £2,000 was intended to be a satisfaction of the interest on the £10,000 so ordered to be paid, and the summons was now adjourned into court.

Southgate, Q.C., and *Kekewich*, for Lady Westbury.

Fry, Q.C., and *Everitt*, and *Roxburgh*, Q.C., and *W. Barber*, for other parties, *contra*.

The MASTER OF THE ROLLS held that the annuity of £2,000 was intended as a satisfaction of the interest on the £10,000, and must abate to that extent.

1874. June 3, 10. The LORDS JUSTICES affirmed the decision (22 W. R., 745).

Solicitors: *Gregory & Co.; Harrison, Beal & Harrisons.*

(1) 34 L. J. (Ch.), 203.
(2) 1 Cox, 427.
(3) Law Rep., 2 H. L., 71, 95.

sold after that event would not pass by will made during coverture.

592] *JESSEL, M.R.: The first question is, what is to be done with regard to a covenant entered into by Mrs. White, a married woman, who had some property settled upon her? It was settled upon such trusts as she should by deed or will appoint, and in default, upon her for life for her separate use, and after her death, on the usual trusts. The covenant was entered into some time afterwards, on the marriage of one of her daughters. She survived her husband, and died a window possessed of considerable property.

Under these circumstances, the first question is, whether the trustees of the daughter's settlement are entitled to stand as creditors, or *quasi* creditors, against the property to which Mrs. White was entitled under her settlement. In other words, whether property settled as her property was separate property for the purposes of the rule that a married woman can bind her separate property for her general engagements. It seems to me that the property in question is so settled as to be within the principle, and that to hold otherwise would be to disregard that which is material for technicalities.

First of all, what do the authorities say? In the case of *Heatley* v. *Thomas* (1) the settlement was in effect a settlement of the lady's property on her during her life for her separate use, with a power of appointment by will; and it was declared that, in case she should die in her husband's lifetime without making any will or other disposition of the settled property, the trustees should hold it for the persons who would have been entitled to it in that event by way of resulting trust. The Master of the Rolls (Sir William Grant) held that the settlement was such a disposition of the property comprised therein to her separate use as to enable her to enter into contracts with respect to it as if she were a *feme sole*. She had power to dispose of the property at any moment, and consequently was in substance the owner of it. It is important to bear in mind that there the question was as to a married woman's bond, which was a general engagement affecting her separate property, for in the present case the covenant can only operate as a separate

593] engagement, since it refers neither to *the power nor the property, and consequently cannot be supported as an execution of the power of appointment.

The next case is *London Chartered Bank of Australia* v.

(1) 15 Ves., 596.

Lemprière (1). There the question arose in this way: A fund was settled to the separate use of a married woman for her life, and afterwards as she should appoint by deed or will, and in default, for her executors, administrators, and assigns. The limitations were not precisely the same as in this case, but in stating his reasons, Lord Justice James says this: "It would be very inconvenient that a married woman with a large separate property should not be able to employ a solicitor, or a surveyor, or a builder, or a tradesman, or hire laborers or servants, and very unjust, if she did, that they should have no remedy against such separate property."

Of course there is no distinction between a case where the life estate precedes the power and a case where it follows it. The true view seems to be this, that, for the purpose of giving effect to the general engagements of a married woman, if property is settled upon her for life with power to dispose of it by deed or will, that is her separate property so as to be subject to her general engagements. On principle, therefore, I think the trustees are entitled to rank as creditors for the £1,000.

The second question is similar to that which came before the court in the case of *Bethell* v. *Abraham* (2). Mrs. White during her coverture made a will in execution of her power of appointment, and gave a sum of £1,000 on trusts not materially differing from the trusts of the £1,000 comprised in the settlement. As I understand the doctrine of satisfaction, an addition to a provision for a child of the child, especially where the child is a daughter, is treated by our courts as an amplification of the trust for the child itself, and a slight difference between the trusts will not prevent the provision being within the rule against double portions. Here the difference is slight; but there is a life estate given to the husband in the settlement, and there is no such gift in the testamentary appointment. Then what is to be done as to the testamentary appointment? It is impossible to deprive the trustees of their right as creditors under the covenant; and consequently the question is, how far is the testamentary appointment satisfied by *the provi- [594 sions of the settlement? The answer is, to the extent to which the daughter and her children take under the settlement. The result is, that there will be nothing coming to the daughter nor anything to her children under the provisions of the will, unless the daughter's husband survive her. To that extent, therefore, the gift by the will is not duplicated in favor of the daughter and her children.

(1) Law Rep., 4 P. C., 572.

(2) *Ante*, p. 590, n.

The third question is, what is to be treated as the separate property of a married woman subject to a power of appointment, when she survives her husband. Part of the property, a dividend, was received after her husband's death; so the separate use cannot attach to that, and it passes to her next of kin. The furniture was comprised in the settlement, but she sold it, and invested the produce in railway stock. It was suggested that the stock remained subject to the power of appointment, but I cannot accede to the suggestion. She disposed of her separate property, and received the produce. The produce, that is the stock, was not her separate property, and consequently it is out of the settlement, and passes to her next of kin.

Solicitors: *W. Millman; J. Fraser.*

[3 Chancery Division, 600.]

M.R., June 14, 1876.

600] *DICKER v. ANGERSTEIN.

[1874 D. 110.]

Mortgage—Power of Sale—Proviso as to Inquiry by Purchaser—Exercise of Power after Security is satisfied—Validity of Sale.

A mortgage contained a power of sale to be exercised by the mortgagee after default, with a proviso that upon any sale purporting to be made in pursuance of the power, the purchaser should not be bound to inquire whether default had been made in payment of any principal or interest, or as to the propriety or expediency of such sale, and that, notwithstanding any impropriety or irregularity in any such sale, the same should, as regarded the protection of the purchaser, be taken to be within the power, and the remedy of the mortgagor should be in damages only. The mortgagee purported to exercise the power in favor of a purchaser for value. In a suit by an incumbrancer of the mortgagor to establish his priority over the mortgagee, it was alleged that if the accounts were taken it would show that the security was satisfied at the time of the sale:

Held, that the sale, having been made to a *bona fide* purchaser without notice, was valid, even if the security should prove to have been satisfied.

By an indenture dated the 12th of July, 1872, and made between W. J. N. Angerstein of the one part, and H. E. Tidy of the other part, Angerstein granted and assigned to Tidy all his real and personal estate by way of mortgage to secure the sum of £2,800 then due to Tidy from W. J. N. Angerstein, and any further advances (which were afterwards 601] made), not exceeding altogether £5,000, *subject to a proviso for redemption on repayment of the principal money and interest on the 12th of January, 1873. And it was thereby provided that, if default should be made in payment of the principal money and interest intended to be thereby secured at the time therein mentioned, it should be lawful for Tidy, his executors, administrators, and assigns,

any time after the 12th of January, 1873, without any further consent on the part of the said W. J. N. Angerstein, to sell the hereditaments and premises thereby granted and assigned, provided always that the said power of sale should not be exercised unless default should have been made in payment of the principal money thereby secured, or the interest thereon should have been in arrear for more than three months.

The power of sale was followed by the following proviso: "Provided also, and it is hereby agreed and declared that, upon any sale purporting to be made in pursuance of the aforesaid power in that behalf, the purchaser or purchasers shall not be bound to see and inquire whether either of the cases mentioned in the clause or provision lastly hereinbefore contained has happened, or as to the necessity or expediency of the stipulations subject to which such sale shall have been made, or otherwise as to the propriety or expediency of such sale, and, notwithstanding any impropriety or irregularity whatsoever in any such sale, the same shall, so far as regards the safety and protection of the purchaser or purchasers, be deemed to be within the aforesaid power in that behalf, and to be valid and effectual accordingly; and the remedy of the said W. J. N. Angerstein, his heirs or assigns, in respect of any breach of the clause or provision lastly hereinbefore contained, or of any impropriety or irregularity whatsoever in any sale, shall be in damages only."

In June, 1874, Tidy purported to exercise the power of sale contained in the mortgage by conveying the mortgaged property to one William Angerstein for valuable consideration.

The bill was filed by the plaintiff, who was an incumbrancer of W. J. N. Angerstein's subsequent to Tidy, to establish his priority over Tidy, and the principal question in the suit was whether the power of sale was or was not properly exercised in June, 1874, it being alleged by the plaintiff that when the accounts were *taken they would show [602 that the security was then satisfied, and that therefore the sale was invalid. The purchaser had no notice that the mortgage money had been paid off.

Chitty, Q.C., *Philbrick*, Q.C., and *C. Browne*, for the plaintiff: In this case, when Tidy purported to convey the property to a purchaser for value, the security was already satisfied, so that the power of sale could no longer be exercised. It may be alleged that the words of the power of sale enable the mortgagee to exercise it "notwithstanding any impropriety or irregularity" in the sale; but that must

mean such an irregularity as is capable of being rectified, and cannot apply to a case where the security is at an end.

Shebbeare, for W. J. N. Angerstein, the mortgagor.

Fry, Q.C., and *Cozens-Hardy*, for William Angerstein, the purchaser.

Davey, Q.C., and *Daniel Jones*, for Tidy, the mortgagee.

Marten, Q.C., for the trustees in bankruptcy of the mortgagor.

JESSEL, M.R.: I have no doubt whatever as to the construction of this deed. The argument on the part of the plaintiff, really, passes over the words of the deed. It is a mortgage of all a man's real and personal estate, not certainly in the common form, with a power of sale providing that it shall be lawful for the mortgagee at any time after the 12th of January then next, without any further consent on the part of the mortgagor, to sell the hereditaments and premises thereinbefore granted, with a proviso that he is not to execute the power of sale unless default shall have been made in payment of the principal money or interest, as therein mentioned.

Now comes the important part: "Provided also and it is hereby agreed and declared that upon any sale purporting to be made in pursuance of the aforesaid power"—that is, not a sale made, but a sale which purports to be made, and therefore the parties were contemplating that that which 603] purported to be a sale in pursuance *of the power might not be a sale at all—that is, that the power would not be really exercisable—"in that behalf the purchaser or purchasers shall not be bound to see and inquire whether either of the cases mentioned in the clause or provision lastly hereinbefore contained has happened, or as to the necessity or expediency of the stipulations subject to which such sale shall have been made, or otherwise as to the propriety or expediency of such sale, and notwithstanding any impropriety or irregularity whatsoever in any such sale"—the term "such sale" being a sale purporting to be made, whether really made under the power or not—"the same shall, as far as regards the safety and protection of the purchaser or purchasers, be deemed to be within the aforesaid power in that behalf"—that is, although it is not within, it is to be deemed within it—"and be valid and effectual accordingly, and the remedy of the said W. J. N. Angerstein"—that is, the mortgagor—"his heirs or assigns, in respect of any breach of the clause or provision lastly hereinbefore contained, or of any impropriety or irregularity whatsoever in any sale, shall be in damages only."

It appears to me that this is put in about as plain language as you can put it, that the right to sell shall be so absolutely vested in Tidy as to give a good title to the purchaser, that is, to a *bona fide* purchaser, which this gentleman is, notwithstanding that the power of sale is not really exercisable; if it purports to be in exercise of the power, which this sale was, it is to be deemed within the power which means that the remedy of Angerstein is against Tidy in damages, which is supposed to be a sufficient protection to the mortgagor; and no doubt, in the case of a solvent mortgagee, it is a very efficient protection. But, then, it is said it does not apply to the case where the power of sale is not exercisable because the mortgage has been paid off. The answer is that it applies to that case as well as to every other. It is a case in which it is still a sale purporting to be made, although the mortgage money has been handed over, and the mortgagor has not taken either the precaution of getting back the mortgage deed, which he could have got back, or of getting a reconveyance, or an indorsement which would have the same effect.

That being so, he left it in Tidy's power to sell to a *bona fide* purchaser without notice, which power has been exercised; even *assuming, as I do, for the purpose of [604 the argument, that upon an account being taken it would show that nothing was due to Tidy upon the security, I should hold that the purchaser had a good title.

I may observe, if it were not so, it would be impossible to sell at all. The whole object of the deed is to enable the mortgagee to sell without inquiry of the mortgagor. If the title to sell depends upon this payment off, the purchaser would be bound to ask the mortgagor whether anything was due. Who is to make the mortgagor answer? He would not answer at all, because he would thereby prevent the sale, and it would defeat the whole object of the parties, or rather of the mortgagee, in putting in the power of sale. It is obvious that that could not have been the intention, and, besides that, it must be recollected that the form of the conveyance is absolute and the power of sale is absolute.

That which cuts down the exercise of the power of sale in the case of no money being due is the implication which is attached by courts of equity to all mortgages, of their being intended as security for money only; when the money is paid off of course the security is at an end, and no power given ancillary to the security can be any longer exercised.

Where we find provisions which rebut that implication as

between the purchaser and the mortgagor, as we do here, there is no occasion to resort to any such doctrine, because the obvious meaning of the whole transaction is that the purchaser is to be safe, if a *bona fide* one, without making any inquiry. If the mortgagor loses his estate through the misconduct of the mortgagee in selling when he has no right to sell, his only remedy would be against him personally for damages. Being, therefore, of that opinion, I must dismiss the bill with costs.

Solicitor for the plaintiff: *H. M. Dalston.*

Solicitors for the defendants: *Sole, Turners & Knight,* agents for Coaks, Norwich; *Tidy, Herbert & Tidy; Abbott & Co.; Lawrence, Plews & Co.*

The general rule is, that a sale upon an execution issued upon a paid judgment transfers no title to a *bona fide* purchaser thereon: Craft *v.* Merrill, 14 N. Y., 456; Stilwell *v.* Carpenter, 59 N. Y., 414, 419; S. C. on re-argument, 62 N. Y., 639, more fully, 2 Abb. New Cases, 238; Freeman on Executions, § 19.

The rule is perhaps otherwise in *Alabama, Connecticut* and *Mississippi:* Freeman on Executions, § 19.

The party causing an execution to be issued upon a paid judgment is a trespasser: McGuinty *v.* Herrick, 5 Wend., 240; Brown *v.* Feeter, 7 Wend., 301; Freeman on Executions, § 19.

And so assumpsit lies to recover back money paid on an execution issued upon a satisfied judgment: Wisner *v.* Bulkley, 15 Wend., 321.

Though a ministerial officer is not liable for executing it: McGuinty *v.* Herrick, 5 Wend., 240; Lewis *v.* Palmer, 6 Wend., 367; Savacool *v.* Boughton, 5 Wend., 170.

A justice who issues a second execution after the first is satisfied, is a trespasser; and it is no excuse that such second execution issued through the false representation that the first was lost: Lewis *v.* Palmer, 6 Wend., 367; Freeman on Executions, § 19.

[3 Chancery Division, 605.

M.R., June 14, 1876.

605] *TAYLOR v. WITHAM.

[1875 T. 160.]

WITHAM v. TAYLOR.

[1875 W. 205.]

Evidence—Admissibility—Written Entries by Deceased Person.

Where an entry in the handwriting of a deceased person is *prima facie* against his interest, it is admissible as evidence for all purposes, irrespective of its effect or value when received.

The following entry in the handwriting of a deceased person, "J. W. paid me three months' interest," which was followed by other entries pointing to a loan to J. W.:

Held to be admissible as evidence, whether or not the effect of it when admitted would be to establish the existence of a debt due to the testator.

WILLIAM FORSTER TAYLOR, the testator in the causes, by his will, made in September, 1872, gave legacies amounting in all to £3,100, to certain members of his own family, and legacies to the amount of £4,000 to certain members of the family of his deceased wife, including a legacy of £2,000 to James Witham, who had married Elizabeth Redgrove, a niece of the testator's late wife, and, as Witham alleged, his adopted daughter; and the testator gave the residue of his estate to his brother Joseph Taylor, and appointed Witham and Taylor executors of his will.

The testator died in July, 1875, and shortly afterwards a question arose as to the legacy of £2,000 to Witham under the following circumstances: It appeared that in December, 1871, shortly after Witham's marriage, the testator had advanced him £2,000, which he expended in the purchase of a house, where the testator afterwards resided with Witham and his wife. Taylor, the residuary legatee, contended that the sum of £2,000 so advanced was not a gift to Witham but a loan, and to be repaid with interest at 4 per cent. Witham, on the other hand, contended that it was a gift in the nature of a marriage portion to his wife.

In September, 1875, an agreement was entered into between Witham and Taylor, whereby Witham purported to relinquish all claim to the legacy in consideration of Taylor releasing him from all liability to refund the sum of £2,000 advanced by the testator. *Witham subsequently [606 refused to carry out the agreement. Taylor accordingly instituted a suit to enforce the performance of the agreement, and Witham instituted a cross suit to set it aside on the ground of surprise and pressure.

Both suits came on for hearing, and Witham gave his evidence to show that the said advance was a gift and not a loan.

During his cross-examination a question was raised as to the admissibility of certain entries in the testator's private account book, the genuineness of which was not disputed, and which was tendered to disprove the statement of the witness. The entries were as follows:—

"1872. Oct. 1.
J. Witham paid me three months' interest . £20 0 0"

and on another page:—

"1872. January.
J. Witham acknowledge lone (*sic*) to this date £2,000.

1876	Taylor v. Witham. Witham v. Taylor.				M.R.
"1872.	March.	Interest	£20	0	0
	July 8.	Interest. Paid me . .	20	0	0
	Oct. 1.	Interest. Paid me . .	20	0	0
	Dec. 27.	Paid interest . . .	20	0	0
			80	0	0 "
"1872. Dec. 27. Paid off £20.		Left	£1,980	0	0 "

Cookson, Q.C., *Bosanquet* and *Rawlins*, for Taylor: We do not dispute that these entries are in the handwriting of the testator, and were made at the time, but we contend that they cannot be admitted as evidence. They can only be admitted if they come within the general rule that entries made by a deceased person, if against his interest, are receivable as evidence of the facts stated in such entries. Here, however, we submit that the entries in the account book, so far from being against the interest of the testator, are directly in his favor, as they purport to show that there was a sum of money due to him from Witham of which at present there is no extrinsic evidence: *Briggs* v. *Wilson* (1). 607] *Unless it can be shown *aliunde* that the entries are against his interest, they cannot be received.

Chitty, Q.C., *Grantham* and *Dyne*, for Witham: These entries are admissible in evidence for all purposes. It cannot be said that any of them, except the one of January, 1872, are in favor of the testator's interest. They are *prima facie* against his interest, and it is immaterial, for the purpose of the admissibility of the entries, what will be the effect of them when admitted: *Higham* v. *Ridgway* (2).

In *Doe* v. *Vowles* (3) a deceased tradesman's bill for repairs, with his receipt thereon, was tendered as evidence of the work having been done for the person charged, and Mr. Justice Littledale rejected the evidence, saying, "The cases have gone quite far enough; there would be no limit if such a paper as this was admitted." That decision, however, was disapproved of by Baron Parke in *Reg.* v. *Inhabitants of Lower Heyford* (4), who said he thought it contrary in principle to *Higham* v. *Ridgway*.

JESSEL, M.R.: This question is one of very great importance, not merely in this particular instance, but in many other cases. The real question is, under what circumstances the entry made by a dead man in his books ought to be received in evidence.

(1) 5 D. M. & G., 12.
(2) 10 East, 109; 2 Sm. L. C., 7th ed., p. 310.
(3) 1 Mood. & Rob., 261.
(4) 2 Sm. L. C., 7th ed., p. 333.

It is, no doubt, an established rule in the courts of this country that an entry against the interest of the man who made it is receivable in evidence after his death for all purposes. What is the meaning of its being against his interest? I adopt the view of Mr. Baron Parke in the case of *Reg.* v. *Inhabitants of Lower Heyford*, that it must be *prima facie* against his interest, that is to say, the natural meaning of the entry standing alone must be against the interest of the man who made it.

Of course, if you can prove *aliunde* that the man had a particular reason for making it, and that it was for his interest, you may destroy the value of the evidence altogether, but the question of admissibility is not a question of value. The entry may be *utterly worthless when you get [608 it, if you show any reason to believe that he had a motive for making it, and that, though apparently against his interest, yet really it was for it; but that is a matter for subsequent consideration when you estimate the value of the testimony.

But it is said that, in order to make the entry available in evidence, you must show by independent testimony that it is an entry against interest. The case before me is an alleged entry of payment of interest made in the testator's ordinary day-book; I need not say that it is a genuine book, because the genuineness of it is not disputed, and it is in the middle of a number of other entries.

The words are these: "October 1st, 1872. J. Witham paid me three months' interest £20." The *prima facie* meaning of that entry is a receipt of money for interest by the testator. It may have a collateral effect, the words being, "Paid me three months' interest," and show that J. Witham owed him a debt. That may be, but that is not the natural meaning of the entry. The entry is a note in the testator's cash-book of a receipt of money by him which is naturally against his interest. If the debt were not disputed it would clearly be so, and, beyond question, the dispute of the debt makes it otherwise. In this particular case, therefore, the real value of the entry is as evidence that there was a debt. But that is a collateral circumstance; if I at once admit the entry as being naturally and *prima facie* against interest, I should say the use which has been made of it is quite immaterial; that is according to all the authorities. But then it was said that you must be able to show *prima facie* that there is something to connect it with. Now, even assuming the rule could go so far as that, I do not understand that it has been anywhere laid down

that you must prove the debt incontestably, though Mr. Justice Littledale, in the case referred to of *Doe* v. *Vowles* (1), rejected evidence which I think ought to have been received. In that case there was a bill for repairs by a carpenter with a receipt for the amount of it, and it was said there was no evidence that the repairs had been done. It was not in favor of the interest of the carpenter, because he had given a receipt for the whole bill, and I see no reason why the entry was not fairly admissible. It proved that the carpen-
609] ter *had been paid for what work he had done; it was, as it appears to me, clearly an entry against interest, and I so far prefer the decision of Mr. Baron Parke to the decision of Mr. Justice Littledale.

Then assume for a moment that it is necessary there must be something more, which I do not think there should, beyond its being *prima facie* against interest. In this case we have something more proved, namely, that the testator made an advance of £2,000 to Mr. J. Witham; it is proved that he received this £20, and, as I understand, it is one of the sums which have been proved to have been paid to him by Mr. J. Witham. Therefore, in this case there is certainly a good deal more than the mere entry, and if it were necessary that you should show a *prima facie* case also of the existence of something beyond the mere entry, I think you have it here. But I ground my decision on the first point, although I call in aid the second.

The other entries are these: "July 8th. Interest paid me £20." "October 1st. Interest paid me £20." "December 27th. Paid interest £20." As regards those three entries they are simply, "Interest paid," and they do not show payment from anybody standing alone.

Why should a man enter in his book "Interest paid me," intending to make an entry for himself, and not against himself? Obviously the natural meaning of it is that it is against himself. "Interest" standing alone would not help him; but these entries appear to be connected with two other entries: "December 27. Paid off £20;" that is against his interest, but following that there is this, "Left £1,980," and that enables you to carry your eye to the connecting entry, which is—"January, 1872. J. Witham acknowledged loan to this date £2,000," and then you see you connect the entries with the £1,980. No doubt, if admissible, it becomes very important evidence by reason of connecting it with the rest of the entry, but the entry itself is only an entry, "Interest paid me." It would not, standing

(1) 1 Mood. & Rob., 261.

alone, have been evidence of a debt from any particular person independent of the connection, and it appears to me when a man puts "Interest paid me," or "Paid off £20," it is *prima facie* a clear entry against interest which ought to be admitted, and I admit it on the general ground; but independently of the general ground, *there is proof [610 that the £2,000 was paid to J. Witham, and there is proof that every one of these four sums of £20 was actually paid to the testator, so that here again we have this fact, that there are entries not standing alone, but connected with the facts proved. I have no hesitation in saying that it is not only admissible as evidence, but is evidence of a very material character, and I rule accordingly.

All the entries were then admitted.

Solicitors: *J. L. Mathews; Prior, Bigg, Church & Adams*, agents for Drummond, Robinson & Till, Croydon.

As to when an entry made by a party against his interest is competent evidence: see 1 Greenl. Ev., § 120 *et seq.*; 2 id., § 291; 1 Whart. Ev., §§ 226–237.

An entry made by a deceased collector of taxes in a private book, kept by him for his own convenience, whereby he charged himself with the receipt of sums of money; held to be evidence against a surety of the fact of the receipt of such money in an action on a bond conditioned for the due payment of the taxes by the collector, although the parties by whom the money had been paid were alive, and might have been called as witnesses; and that upon the general principle that the entry was to the prejudice of the party who made it: Middleton *v.* Mellon, 10 Barn. & Cress., 317, 21 Eng. Com. Law Rep.; Sherman *v.* Crosby, 11 Johns., 70.

Entries in the books of a bank, and in the pass-book of the maker of a promissory note held by the bank, made while the bank was the owner of the note, are competent evidence, in a suit on the note brought by one to whom it was transferred after it became due, to show that it had been paid. Such entries are themselves evidence, *prima facie*, when no circumstances of suspicion appear, of the *time* when they were made: Jermain *v.* Denniston, 6 N. Y., 276; 1 Greenl. Ev., §§ 147–8.

Though the written receipt of a mortgagee, the date of which was not proved otherwise than by the writing itself, is not evidence against the assignee of the mortgage subsequent to such date, of a payment by the mortgagor: Foster *v.* Beals, 21 N. Y., 247, 250–1, distinguishing Jermain *v.* Denniston, *supra*.

Where the defendants attempted to show that a judgment by confession, between other parties, under which plaintiff claimed title to the goods in controversy, was without consideration and collusive, and had given some evidence of a confederacy between the parties to the judgment, at the time it was confessed, to defraud creditors; held, that it was not competent for them to prove the declaration of the defendant in the judgment, made *before* it was confessed, to the effect that the plaintiff in the judgment was indebted to him, the defendant: Legg *v.* Olney, 1 Denio, 202.

It seems that such declarations would be admissible, if made at or after the time of the confession of the judgment and in furtherance of the common object: Legg *v.* Olney, 1 Denio, 202.

It is not competent to prove, for the purpose of establishing the fact, that a chattel mortgage was executed as security for a note given to compound a felony, that one of the assignors of the mortgage said, before the assignment thereof, that he knew the mortgage was given to settle and drop a criminal prosecution: Earl *v.* Clute, 2 Abb. Ct.

App. Dec., 1, and see cases cited in note; S. C., 1 Keyes, 36.

Entries made by third persons in the usual course of employment contemporaneously with the transaction recorded, are admissible, to prove the fact stated, after the death of the person by whom the entry was made. An entry by an attorney in his register of the making of an order or decree is within the rule: Fisher *v.* Mayne, 67 N. Y., 77; Livingston *v.* Arnoux, 56 N. Y., 507, 518; Doe *v.* Tinford, 5 Barn. & Ad., 898; Brewster *v.* Doane, 2 Hill, 537; Leland *v.* Cameron, 31 N. Y., 115; 1 Greenl. Ev., § 115; 2 Fisher's Digest, 3799; 1 Whart. on Ev., §§ 238–251.

See 15 Eng. Rep., 371 note.

The rule applies to entries made by a physician showing the time of birth of a person, after the death of the physician: Arms *v.* Middleton, 23 Barb., 571.

To render an entry made by a person in the course of business or duty admissible in evidence after his death, it is not necessary that the duty should be one imposed by law.

An entry of the baptism of T. D., contained in the baptism book of the Roman Catholic parish church in the handwriting of the clergyman who performed the ceremony, was received in evidence after his death, it being proved that, by the rules of the church, it was his duty to make the entry, and that neglect of such duty would render him liable to ecclesiastical penalties: Dillon *v.* Tobin, 6 Cent. L. J., 285, Irish Court of Probate, disapproving Davis *v.* Lloyd, 1 Car. & Kirw., 275, approving Malone *v.* Lestrange, 2 Irish Eq. R., 16, and distinguishing Farrell *v.* Maguire, 3 Irish Law Rep., 187.

See also 1 Whart. Ev., §§ 219, 660.

Where the person who served a notice to quit, died between the hearing of a civil bill of ejectment below, and the hearing on appeal, it was held the service might be proved by a memorandum in his handwriting, and that it was not necessary to prove it by proof of his evidence below: Farnan *v.* Tisdall, Six Circuit Cases (Irish), 5.

But see Stapylton *v.* Clough, 22 Eng. L. and Eq. R., 275, 2 Ell. & Bl., 933, *contra* as to a mere verbal declaration of such service.

It is provided in New York by statute, that "whenever it shall be necessary on the trial of any action or in any judicial proceeding to prove the service of any notice, an affidavit showing such service to have been made by the person making such affidavit, shall be received as presumptive evidence of such service, upon first proving that such person is dead or insane." Laws 1858, ch. 244, p. 394; 4 Edm. St., 645–6; 3 R. S., 6th ed., 663.

The books of a corporation are admissible as evidence against its stockholders: Culver *v.* Third, etc., 64 Ills., 528.

A mere indorsement made on a note by the plaintiff himself, without the knowledge of the defendant or proof of payment of the sum indorsed, will not take the demand out of the statute of limitations: Whitney *v.* Bigelow, 4 Pick., 110; Roseboom *v.* Billington, 17 Johns., 182; Murtagh *v.* Crawford, 12 Irish Law Rep., 456; Willis *v.* Newham, 3 Younge & Jervis, 518; Taylor *v.* McDonald, 2 Mills' Const. Rep. (S. C.), 178; 1 Greenl. Ev., §§ 121–4; 2 id., § 291.

Though the rule is presumptively otherwise, if it be first shown that it was or had been made before the statute had run, when its operation would be against the interest of the party making it: on such proof being given it is good evidence for the consideration of the jury: Roseboom *v.* Billington, 17 Johns., 182; 1 Greenl. Ev., §§ 120–3; 2 id., § 291; Wheeler *v.* Robinson, 50 N. H., 303, 304; Coffin *v.* Buckman, 12 Maine, 471; Chandler *v.* Lawrence, 3 Mich. 261; Evans *v.* Smith, 34 Maine, 33; Chase *v.* Smith, 5 Verm., 586; Sherman *v.* Crosby, 11 Johns., 70; Woodhouse *v.* Simmons, 73 N. C., 30, 32, and cases cited; Williams *v.* Alexander, 6 Jones (N. C.), 137.

An indorsement, in the handwriting of the debtor, but not signed by him, of a payment of part of a promissory note, will not prevent the operation of the statute of limitations, if no money or valuable consideration actually passes between the parties, even if the parties, at the time of the indorsement, orally agree that it shall be deemed to be a payment: Blanchard *v.* Blanchard, 123 Mass., 558; Carroll *v.* Forsyth, 69 Ills., 128; Kimball *v.* Kimball, 16 Mich., 211; Chambers *v.* Marks, 25 Penn. St. Rep., 296; Woodhouse *v.* Simmons, 73 N. C., 30, 32, and cases cited.

Though such an indorsement would be *prima facie* evidence of an actual payment: Blanchard *v.* Blanchard, 122 Mass., 560; Sibley *v.* Phelps, 6 Cush., 172.

Such an indorsement is always open to explanation: Blanchard *v.* Blanchard, 122 Mass., 561; Hildreth *v.* O'Brien, 10 Allen, 104; Foster *v.* Dawber, 6 Exch., 839, 848; McCrea *v.* Purmort, 16 Wend., 460, 478.

[3 Chancery Division, 610.]

M.R., June 19, 1876.

COMMISSIONERS OF SEWERS OF THE CITY OF LONDON v. GELLATLY.

[1871 L. 127.]

Action—Practice—Numerous Parties—Representation by Defendant—Enforcing Judgment against Party represented—Binding Judgment—Supplemental Proceeding.

A suit was instituted in the Court of Chancery by plaintiffs on behalf of themselves and all other occupiers of lands and tenements within Epping Forest, against, amongst others, the lord of a manor within that forest and two grantees from that lord of part of the wastes of the manor. The plaintiffs claimed to be entitled to rights of common over the wastes of the manor, and alleged that the lord of the manor in question inclosed or authorized the inclosure of large portions of the waste, so as to interfere with the rights of common, and had granted other portions of the waste to persons who made similar inclosures, and that such persons were too numerous to be made parties to the suit, but were sufficiently represented by the two grantees made defendants thereto. A decree was made establishing the right of common claimed, and granting an injunction. After the Judicature Acts came into operation the same plaintiffs filed a supplemental statement of claim against another grantee from the same lord, seeking to have the benefit of the decree against him, and an injunction:

Held, on demurrer, that the defendant was bound by the decree in the suit so that he could not litigate the right of common thereby established:

Held, also, that the proceedings for enforcing the decree against him were not purely supplemental, but in the nature of original proceedings.

THIS was a demurrer to a "supplemental" statement of claim. The writ in the action was issued on the 13th of April, 1876. *The plaintiffs were the Commissioners [611 of Sewers of the City of London on behalf of themselves and all other the owners and occupiers of lands and tenements lying within the Forest of Essex, in the county of Essex, other than the waste lands of the said forest, except such of them as were defendants to the further reamended bill of complaint in the statement of claim mentioned, or were in the said bill alleged to be sufficiently represented by the defendants thereto, or some of them, and except the defendant to the action. The defendant was Peter Gellatly.

The statement of claim stated to the following effect: On the 14th of August, 1871, the plaintiffs filed in the High Court of Chancery the original bill in *Commissioners of Sewers of the City of London* v. *Glasse* (1), which was after-

(1) Law Rep., 7 Ch., 456; Law Rep., 19 Eq., 134.

wards amended, reamended, and further reamended, and as further reamended was on behalf of the plaintiffs and all other the owners and occupiers of lands and tenements lying within the forest of Essex in the county of Essex, otherwise Waltham Forest or Epping Forest, other than the waste lands of the said forest, except such of them as were defendants thereto, or were thereafter alleged to be sufficiently represented by the defendants thereto or some of them. Among the defendants to the further reamended bill were John Whitaker Maitland, Chamberlayne Hickman Lake, and John Williams. The further reamended bill alleged (in accordance with the fact) that the said Forest of Essex, commonly called Waltham Forest or Epping Forest, contained a large tract of waste and inclosed lands, and included, amongst other manors or reputed manors therein mentioned, the whole of the manor of Loughton (of which John Whitaker Maitland was lord), and that the lords and ladies of several of the manors within the forest, as such lords and ladies or in some other capacity, pretented to be entitled to inclose the waste lands of the said forest, and to dig up and destroy the pasture, turf, and other herbage growing thereon, and had respectively inclosed, or authorized or sanctioned the inclosure, of large tracts of the said wastes, and in particular that several of the defendants had made certain inclosures from the said wastes which were specified in the further reamended bill, and that the said 612] J. W. Maitland *had authorized or sanctioned, among other inclosures within the last eight years before the filing of the said original bill, a series of inclosures containing altogether about 1,300 acres, and comprising the whole of the waste within his said manor with the exception of a few small plots thereof, and had sold and granted or conveyed a piece of inclosed land (in the said bill particularly described) to the said John Williams, who claimed to be the owner thereof by virtue of such grant or conveyance, and that the other persons to whom portions of the waste lands within the said forest inclosed in the manner thereinbefore complained of were alleged to have been sold and granted or conveyed as aforesaid, and who claimed to be owners or occupiers of such waste lands, and the other persons, if any, who claimed to be owners or occupiers of waste lands within the said forest, were too numerous to be made parties to the said suit, and that they were sufficiently represented for the purposes of the said suit by the defendants thereto or some of them. The said Chamberlayne H. Lake and John Williams were made parties to the said suit of *Commissioners*

of Sewers v. *Glasse* (') for the purpose of representing, and (as the plaintiffs alleged) they did sufficiently represent, grantees of the waste lands of the said forest inclosed in manner in the said further reamended bill mentioned. The case of *Commissioners of Sewers* v. *Glasse* was heard before the Master of the Rolls, who, on the 20th of November, 1874, made a decree declaring that the plaintiffs and the other owners and occupiers of lands and tenements lying within that part of the Forest of Essex, in the county of Essex, now known by the name of Epping Forest, other than the waste lands of the said Epping Forest, were entitled in right of and as appurtenant to their several lands and tenements within the said Epping Forest, to a right of common of pasture upon all the waste lands of the said Epping Forest for all manner of cattle (that is to say, neat beasts and horses) commonable within the forest, levant and couchant upon their respective lands within the said Epping Forest, according to the assize and customs of the said Epping Forest; and that the plaintiffs were entitled to an injunction to restrain certain of the defendants (including J. W. Maitland, C. H. *Lake, and J. Williams) from permitting or suffer- [613
ing to be or to remain inclosed or built upon any of the waste lands of the said Epping Forest, other than and except (*a*) lands which, on the 14th of August, 1871, were actually covered with buildings, or actually inclosed and used as the gardens belonging to or curtilages of buildings, or (*b*) lands actually inclosed on or before the 14th of August, 1851, and he granted an injunction for the purpose of giving effect to such declarations. This decree was enrolled in Chancery on the 30th of July, 1875.

The defendant Peter Gellatly claimed to be the owner of and was in the possession and occupation of several pieces of land, parts of the waste lands of Epping Forest, and included in inclosures specified and complained of in the bill filed in the suit of *Commissioners of Sewers* v. *Glasse* (').

These pieces of land contained together 66A. 2R. 7P. or thereabouts, and were granted or conveyed by the said John W. Maitland on the 24th of June, 1862, and on subsequent days, as to part thereof, to the defendant Peter Gellatly, and as to the residue thereof to Edward Gellatly, his brother, and that such of them as were formerly copyhold of the said manor of Loughton had since been enfranchised. These pieces of land were now fenced in or otherwise inclosed, but were not lands which on the 14th of August, 1871, were actually covered with buildings, or actually inclosed and

(') Law Rep., 7 Ch., 456; Law Rep., 19 Eq., 134.

used as the gardens belonging to or curtilages of buildings, nor lands actually inclosed on or before the 14th of August, 1851.

The defendant Gellatly alleged that he was not represented in the suit of *Commissioners of Sewers* v. *Glasse*, and was not bound by the decree therein, and declined to remove the fences surrounding the said pieces of land granted to him.

The plaintiffs claimed that the action might be taken as supplemental to the suit of *Commissioners of Sewers* v. *Glasse;* that they might have the same benefit of the decree in that suit and the same relief against the defendant as if he had been a party to that suit; and an injunction to restrain the defendant from permitting the said pieces of land to remain inclosed or built upon, and from carrying away the soil thereof, and injuring the turf, herbage and pasture thereon.

614] **Chitty*, Q.C., and *Vaughan Hawkins*, for the defendant: First: The defendant not having been a party to the suit of *Commissioners of Sewers of the City of London* v. *Glasse* (1), is not bound hand and foot by the decree made therein, so that he cannot litigate the questions over again. In giving judgment on the demurrer in that case Lord Justice James said (2): "It is said that the decision of this court may prejudice people who are absent. That is a question for these people and not for the defendants. They do not represent them, and they are not the protectors of those persons who are absent. It will only prejudice them in exactly the same way as an action against one of the tenants. Supposing an action had been brought by one of the commoners against one of the encroachers, and a verdict obtained —that, of course, to a great extent, practically would prejudice every one else, and to that extent a decree here might prejudice persons who are absent. But of course no proceedings here will ever be a *res judicata* against a person who is not present to defend himself, and it will be open to him to make any defence afterwards." No doubt the decree will be evidence, and very cogent evidence, against the defendant, and it may be very difficult for the present defendant to rebut that evidence; but all we contend on this occasion is, that the decree does not absolutely prevent the defendant from litigating the question. It is right that it should be so; for the plaintiff has the right to select the defendants to his suit, and it is impossible for the court in cases such as these to prevent collusion: *Powell* v. *Wright* (3).

(1) Law Rep., 7 Ch., 456; Ibid, 19 Eq., 134.

(2) Law Rep., 7 Ch., 466.

(3) 7 Beav., 444.

Besides, this case is different from those in which the principle of representation has been allowed; for in all those the parties represented were connected by a common link in some way, as, for example, by being tenants in the same manor, shareholders in the same company, creditors of the same estate, and so on; but the present defendant is merely the owner of a separate inclosure, and has no connection with the persons made defendants to the former suit.

[The MASTER OF THE ROLLS: The defendant is one of the very numerous owners of a particular waste.]

Secondly: The Epping Forest Amendment Act, 1872 (35 & 36 *Vict. c. 95, ss. 2, 3), provides that no new legal [615 proceeding, "except such supplemental or amended bills as may be filed by the Commissioners of Sewers for the purpose of making effectual" the suit of *Commissioners of Sewers* v. *Glasse* (1) shall be instituted without leave of the Epping Forest Commissioners. The statement of claim does not allege that leave has been obtained, and it is therefore demurrable, *Braund* v. *Earl of Devon* (2), unless it is a "supplemental bill" within the meaning of the section. Under the old practice this would clearly not have been a supplemental suit. A bill to carry a former decree into effect is classed by Lord Redesdale among bills in the nature of original bills; and a supplemental bill is defined as merely an addition to the original: Mitford on Pleading (3). This would clearly have been an original bill against the present defendant.

The MASTER OF THE ROLLS referred to *Mayor of York* v. *Pilkington* (4), and said that he understood the rule of the Court of Chancery, ever since Lord Hardwicke's time, to have been this, that where one multitude of persons were interested in a right, and another multitude of persons interested in contesting that right, and that right was a general right—and it was utterly impossible to try the question of the existence of the right between the two multitudes on account of their number—some individuals out of the one multitude might be selected to represent one set of claimants, and another set of persons to represent the parties resisting the claim, and the right might be finally decided as between all parties in a suit so constituted. No doubt the plaintiffs must have the right of selecting the defendants unless the persons interested in resisting the claim chose to file a bill to establish their rights, in which case the two suits

(1) Law Rep., 7 Ch., 456; Ibid, 19 Eq., 134.
(2) Law Rep., 3 Ch., 800.
(3) 5th ed., pp. 36, 37.
(4) 1 Atk., 282.

would go on together as cross suits. For example, in the present case, Mr. Gellatly might have filed a bill to restrain interference with his inclosures, and there might have been two plaintiffs selecting their defendants. But that was not done, and the court being satisfied that the parties were fairly 616] represented before it, and that the matter was *fairly contested, made a final decision of the right, and everybody interested, although not actually present, was bound by that decision, because he was present by representation. Mr. Gellatly was as much bound as he would have been in a suit by a shareholder who filed a bill to have the rights of the shareholders declared; as in *Henry* v. *Great Northern Railway Company* (1), though the plaintiff in that case was only a single shareholder. But if Mr. Gellatly could show fraud or collusion, or anything of that sort, or show that the court was cheated into believing that the case was fairly fought or fairly represented, when in point of fact it was not, then he was entitled to the same benefit of such a defence as anybody else in a similar case. Again, all that was finally decided was the existence of a general right of common, and it was open to Mr. Gellatly to show that he had special ground of exemption: the decree was not final against him for any other purpose except the establishment of the general right. The plaintiffs must, however, show that an action to enforce such a decree was a supplemental proceeding.

Fry, Q.C., and *W. R. Fisher*, for the plaintiffs: The defendant is clearly bound by the decree, and the proper mode of enforcing it was formerly by supplemental bill, and now by supplemental action: *Adair* v. *New River Company* (2); *Weall* v. *West Middlesex Water Works Company* (3); *Jenkins* v. *Cross* (4). Lord Redesdale says this: "The means of supplying the defects of a suit, continuing it if abated, or obtaining the benefit of it, are, 1, by supplemental bill."

[The MASTER OF THE ROLLS: But he says also: "5, by original bill in the nature of a supplemental bill." I do not think you can have a purely supplemental bill after decree except when it is in the nature of a bill of revivor.]

We further submit that it is not incumbent on us to allege that we have obtained leave from the Commissioners.

[The MASTER OF THE ROLLS said that *Braund* v. *Earl of Devon* (5) was clearly in point as to that.]

(1) 1 De G. & J., 606.
(2) 11 Ves., 429.
(3) 1 Jac. & W., 358.
(4) 15 Sim., 76.
(5) Law Rep., 3 Ch., 800.

*[They stated, in answer to questions put by the [617 court, that leave had not in point of fact been obtained, but that they believed they could obtain leave from the Commissioners.]

JESSEL, M.R.: This demurrer is filed on two grounds. The first is one of substance, viz., that the defendant is not bound by the decree which I pronounced in the former case. I think, for the reasons I have already given, that he is bound by it; and in my opinion the defendant fails on that ground.

The other ground is, that leave ought to have been given by the Epping Forest Commissioners before the suit was instituted. I think the defendant is right on that point. The words in the act are that "no legal proceedings, except such supplemental or amended bills as may be filed by the Commissioners of Sewers for the purpose of making the said suit effectual, shall, after the passing of this act, be instituted, brought or taken." I am of opinion that this is neither a supplemental bill nor an amended bill. It is not a supplemental bill. First, it is not a bill at all, but I pass that over. I will assume it to be a bill against a new party, having for its object to enforce the decree obtained so far as regards the new defendant. Now, that party might put in a defence showing, for instance, that the original decree was fraudulently obtained, or that he has some special ground why his particular lands are exempt from the right in question. He is bound by the declaration that there is a right of common over the forest, but he may deny that his particular lands are part of the forest; or he may say they were disafforested before the existence of the general right, although perhaps it might be difficult for him to maintain that. However, that, in my opinion, shows the supposed bill to be an original bill; and this, therefore, ought to have been an original statement of claim. This is a point of substance if the Commissioners refuse the leave; and in that case I shall hold the defendant is entitled to his costs, the object of the act being that no defendant was to be vexed with a Chancery suit without the leave of the Commissioners. But if the Commissioners give leave, then the objection is mere form, and the expense of this hearing will have been wasted. The result, therefore, in my opinion, *ought [618 to be, to give the plaintiffs leave to amend by striking out the word "supplemental," and stating the leave of the Commissioners if it is obtained. If the leave of the Commissioners is not obtained within a fortnight, then the demurrer

will be allowed with costs; if the leave of the Commissioners is obtained, then the costs will be reserved.

Solicitors: *Gellatly, Son & Warton; Horne & Hunter*, agents for Nelson, City Solicitor.

[3 Chancery Division, 618.]

M.R., June 29, 1876.

In re FRITH AND OSBORNE.

[1876 F. 75.]

Power of Sale and Exchange—Partition—Vendor and Purchaser—Title.

A power of exchange of lands is properly executed by a partition.

Accordingly, where an undivided moiety of lands was vested in A., B., and C., as trustees of a settlement which expressly authorized a partition, and the other moiety was vested in D., E., and F., as trustees of a settlement, with power to sell, dispose of, convey, and assign the said hereditaments for such a price in money, or for such an equivalent or recompense in lands and hereditaments as to the trustees should seem reasonable, and for that purpose to revoke the old uses and to limit other uses and trusts, and a partition deed, purporting to be in exercise of the said powers, was executed by the trustees of the two moieties:

Held, that the partition was properly effected by D., E., and F., under their power.

Semble, a partition between any number of persons might properly be effected under a similar power.

The *dictum* in Sheppard's Touchstone (1), that "joint tenants, tenants in common, and coparceners cannot exchange the lands they do so hold with another before they have made partition"—questioned.

THIS was a summons, taken out under the Vendor and Purchaser Act, 1874, for the purpose of obtaining the opinion of the court on the validity of a partition deed purporting to be made in exercise of a power of sale and exchange, so far as the same related to the hereditaments comprised in the first schedule thereto, which were the subject-matter of an intended purchase.

By an indenture dated the 3d of April, 1861, the undi-
619] vided *moiety of certain hereditaments devised by the will of a testatrix were conveyed unto and to the use of F. Falkner, G. Skinner, and S. P. Townsend, in fee as trustees of the settlement of Mr. and Mrs. Fitzmaurice, upon trust as therein mentioned; and it was provided that it should be lawful for the said trustees, at the request of Fitzmaurice and his wife, or the survivor of them, to join and concur with the persons entitled to the other undivided moiety of the said hereditaments in making a partition thereof, and for that purpose, by any deed or deeds, to revoke the uses and trusts thereinbefore declared, and to de-

(1) Page 292.

clare any uses, estates, or trusts of the said hereditaments which it should be thought necessary or expedient.

By an indenture dated the 9th of May, 1865, the other undivided moiety of the hereditaments devised by the said will were conveyed unto and to the use of H. Frith, W. Ross, and John Sparks, in fee, upon and for the trusts and purposes of an indenture of settlement of even date therewith. And by the last mentioned indenture of settlement (made in pursuance of articles on the marriage of Mr. and Mrs. Frith) it was agreed that the said H. Frith, W. Ross, and J. Sparks, therein called "the said trustees," should stand possessed of the said undivided part upon trust as therein mentioned; and it was thereby agreed that it should be lawful for the said trustees, with the consent of Frederick Frith and his wife, to sell, dispose of, convey, and assign the said hereditaments and premises, or any part thereof, to any person or persons, by way of absolute sale for such a price in money, or by way of exchange for such equivalent or recompense in lands and hereditaments as to the said trustees should seem reasonable, and for that purpose to revoke, determine, and make void all or any of the uses, trusts, powers, and provisos therein expressed and contained as to all or any part or parts of the said hereditaments and premises of which the trusts were therein expressed (except leases made in execution of the power thereby given), and to limit and appoint any such new or other use or uses, trust or trusts, of or concerning the same hereditaments and premises, or any part or parts thereof, as they should think necessary or expedient.

By a deed of partition dated the 22d of February, 1868, between Mrs. Fitzmaurice (who had survived her husband), of the first part, *Falkner, Skinner and Townsend, [620 of the second part, Mr. and Mrs. Frederick Frith, of the third part, and Henry Frith, Ross and Sparks, of the fourth part, after reciting that it had been mutually agreed to make a partition of the hereditaments comprised in the schedule thereto in the shares and in manner thereinafter appearing—one undivided moiety of the same hereditaments being then held by Falkner, Skinner and Townsend, as trustees of the settlement of the 3d of April, 1861, and the other undivided moiety by Henry Frith, Ross and Sparks, as trustees of the settlement of the 9th of May, 1865—it was witnessed that, in pursuance of the said agreement, and for effectuating the said intended partition, they the said Falkner, Skinner and Townsend, at the request of Mrs. Fitzmaurice, and in exercise of the power given to them by the settlement of the 3d

of April, 1861, revoked the uses and trusts thereby declared concerning their undivided moiety of the hereditaments comprised in the first part of the schedule to the said partition deed, and declared that the same should thenceforth be held upon the trusts, and with and subject to the uses, trusts, and purposes in and by the settlement of the 9th of May, 1865, contained and declared concerning the undivided share of the hereditaments therein comprised; and it was thereby further witnessed that, in further pursuance of the said agreement, the said Henry Frith, Ross and Sparks (with the consent of Frederick Frith and his wife), in pursuance of the power given to them by the settlement of the 9th of May, 1865, revoked the uses, trusts, and powers in the same settlement expressed and contained concerning their undivided moiety of the hereditaments contained in the second part of the said schedule, and limited, appointed, and conveyed the same undivided moiety unto and to the use of Falkner, Skinner and Townsend, upon and for the trusts and purposes of the indenture of the 3d of April, 1861.

The trustees of Mr. and Mrs. Frith's settlement having contracted with Alexander Osborne for the sale to him of certain lands comprised in the first part of the schedule to the partition deed of the 22d of February, 1868, the question was raised by the intending purchaser whether the partition was properly effected under the power of sale and exchange in the settlement of the 9th of May, 1865.

621] * *Whitcombe*, for the vendors, submitted that the partition was authorized by the power of sale and exchange contained in the settlement of the 9th of May, 1865. He referred to *Abel* v. *Heathcote* (1), *M'Queen* v. *Farquhar* (2), *Doe* v. *Spencer* (3), *Attorney-General* v. *Hamilton* (4), *Bradshaw* v. *Fane* (5), Sheppard's Touchstone (6), and Lord St. Leonards on Powers (7).

W. W. Karslake, for the purchaser.

JESSEL, M.R.: The first question which I have to decide is whether an ordinary power of sale or exchange does or does not authorize a partition, and I prefer putting my decision upon the broad ground, though I will show presently that this title is quite independent of that ground. The title depends upon a deed which was originally articles for a settlement, and which has been carried into effect by an actual settlement, by which the legal estate was con-

(1) 4 Bro. C. C., 278; 2 Ves., 98.
(2) 11 Ves., 467.
(3) 2 Ex., 752.
(4) 1 Madd., 214
(5) 3 Drew., 534; 2 Jur. (N.S.), 247.
(6) Page 292.
(7) Pages 856–857.

veyed to trustees of the names of Frith, Ross and Sparks, and the power contained in the settlement was to sell, dispose of, convey and assign the said hereditaments and premises, which refers to what was conveyed, which was "an undivided moiety." [His Lordship then read the power.]

If you read the words of that power, it will be seen that it is not in fact a power simply to exchange, but it is to sell, dispose of, convey, and assign by way of absolute sale or by way of exchange. Of course the word "sell" refers to "sale," and the word "exchange" refers to "dispose of," and, therefore, it comes to this, whether a trust (for this is a trust estate) including a power to dispose of by way of exchange for an equivalent in other lands and hereditaments, authorizes trustees to dispose of the undivided moiety, which they are empowered to dispose of, for another undivided moiety. Why it should not I cannot conceive upon the words. It is to dispose of the undivided moiety by way of exchange for such equivalent in value of hereditaments, which *includes an undivided moiety, as they may [622 think fit. They think fit to dispose of this undivided moiety by way of exchange for another undivided moiety. The words are not "in exchange," but "by way of exchange," but I do not much rely upon that. Standing alone, one is at a loss to see what the doubt is. Upon this particular instrument no doubt the word "hereditaments" includes an undivided moiety. They may convey their own undivided moiety by way of exchange for an undivided moiety of some other lands. Why may they not for an undivided moiety of lands which happen to be held under the same settlement?

If one were reading this for the first time, and did not know anything of real property law, it would not be easy to see what the doubt could be. That it is doubtful is plain from Mr. Dart's book (1), where he says it is doubtful. Upon looking at the last edition of Lord St. Leonards on Powers in the year 1861, he does not put it so strongly. He says (2): "It has frequently been a question amongst conveyancers whether the usual power of sale and exchange does not authorize a partition"—that is, does not authorize a partition in effect, because when I come to look at what was done in this case, though the parties recite that they intend to make a partition, what they do is to convey an undivided moiety in consideration of the other undivided moiety in the other lands being conveyed to them. It is not a strict partition, but a conveyance by way of partition; that is how they actually carry it out. Then he says, "And

(1) Page 78.

(2) Pages 856, 857, 859.

several partitions have been made by force of such powers under the direction of men of eminence. This point underwent considerable discussion on the title, which afterwards led to the case of *Abel* v. *Heathcote* (1). Mr. Fearne thought that the power did authorize a partition, on the ground that the partition was in effect an exchange." Then he discusses the case, which I shall have to discuss again, of *M'Queen* v. *Farquhar* (2), and concludes: "Until the question shall receive a further decision, it can scarcely be considered clear that a power to exchange will authorize a partition."

He does not, therefore, go so far as to say it is doubtful, but says "until the question shall receive a further deci-
623] sion it can scarcely *be considered clear." From this I should imagine that Lord St. Leonards thought that it ought to be decided that it was clear. He comments on *Doe* v. *Spencer* (3), and says that "if they were right in holding, as they did, that at common law two tenants in common may exchange with each other their respective moieties of the different parts of the land held in common, it must follow, where the moiety of an estate is settled to uses with a power of exchange in the trustees, that such a power may be well executed by dividing the lands into two portions to be held in severalty, one on the uses of the settlement, the other by the party entitled to the other moiety."

In this passage where he says "if they were right," he means by the use of the word "if" to intimate a doubt. Whether the judges who decided *Doe* v. *Spencer* were right or wrong, he does not know; but assuming *Doe* v. *Spencer* to be right, he says it must follow that such power may be well executed by a partition. Therefore, according to Lord St. Leonards, the only thing remaining doubtful was whether *Doe* v. *Spencer* was right.

This being a question as to the law of real estate, it does not depend upon the individual notion of any judge as to what the law ought to be, but upon what is decided by authority. It is too late to argue any question as to real estate law in this country upon principle. Real estates are held upon title; the law is founded upon the extraordinary caprices of former real property lawyers, supposed to be derived from the rules of feudal tenure. It is often impossible to find the principle upon which a decision is founded, or whether there is any principle at all; therefore it becomes incumbent upon every judge to look at the authorities, and to see how far the authorities have settled

(1) 4 Bro. C. C., 278. (2) 11 Ves., 467. (3) 2 Ex., 752.

the law, and to follow them implicitly if he finds that the law is settled.

The case of *Abel* v. *Heathcote* (1) is the first case which it is necessary to refer to. The best report of it is to be found in Brown's Chancery Cases. That seems to be decisive of this particular case before me at all events, because the words are to my mind undistinguishable. There the legal estate was in trustees, which was very much relied on by Lord Loughborough, who decided the case. The words were, "to make sale of and convey, *surrender, and assure, or convey in exchange, for or in lieu of other manors, lands, and hereditaments, all or any of the said freehold and copyhold lands, &c., thereby granted for the best price in money, or for such other equivalent in manors, lands, or hereditaments as should to them, the trustees, seem reasonable." Here the words are "such equivalent or recompense in lands or hereditaments," which are plainly undistinguishable. I think that the criticism of Lord St. Leonards, in his treatise on Powers (2), upon Lord Eldon's judgment, speaking with great deference of such great authorities, is not well founded. I think that Lord Eldon was right in construing the words "to make sale of, and convey, surrender, and assure, or convey in exchange," as being separate things. There might be something on an exchange which required a surrender, as well as on a sale, and he read it "to make sale of and convey, settle, and assure, or to convey and exchange." I think that is a fair reading, and that evidently was the opinion of Sir Thomas Plumer, who, in commenting upon it in *Attorney-General* v. *Hamilton* (3), evidently thought that the words were to be read in that way, and I must take the construction as these judges have taken it. In the opinion of Lord Eldon, who doubted the general proposition attempted to be laid down by Lord Loughborough, at all events *Abel* v. *Heathcote* (1) was well decided, because, if the power were to convey "for such equivalent in lands as the trustees should think fit," you might convey an undivided moiety, and in that way there would be a partition, and *Abel* v. *Heathcote* would still be an authority. But Lord Loughborough went further. Though the Commissioners doubted and differed, when the case came before Lord Loughborough he laid down the general proposition that the ordinary power of sale and exchange would authorize partition, and it was not until the case of *M'Queen* v. *Farquhar* (4) that there [624

(1) 4 Bro. C. C., 278; 2 Ves., 98.
(2) Page 857.
(3) 1 Madd., 214.
(4) 11 Ves., 467.

was any doubt about it; but when *M'Queen* v. *Farquhar* was argued before Lord Eldon, he expressed his doubts about it. He there says (1): "In the ordinary settlements of great estates, powers of sale, partition, exchange, &c., are inserted. As to the first special caution is used, if there 625] is not a *previous power of revocation, to declare at what time the uses shall be revoked and the seisin shall attach upon the new use, and no cesser or determination of the old uses or creation of new uses arises, except in the very circumstances described. This is a power of revocation, but to the intent to do some other act, and that intent, as prescribed by the instrument, must accompany the revocation in order to make the revocation effectual. It is clear this was not disturbed by decision, though there were floating opinions, until the case of *Abel* v. *Heathcote* (2). I doubt whether the language I hear and have read, that a power of exchange is well executed by a partition, is authorized by anything in that decision. Exchange and partition are very different, according to Sheppard's Touchstone (3) and other old books. You cannot exchange till there has been a partition. There is infinite difficulty in saying a partition under the execution of a power by a tenant for life with those who have the inheritance in the other moiety could be called an exchange." If that means anything, it means this, that, having legal uses to deal with, exchange is different from partition, and you cannot exchange until after partition. That is the ground of Lord Eldon's doubt in that judgment. Of course, therefore, after that decision it must be considered, and was treated by Sir Thomas Plumer in *Attorney-General* v. *Hamilton* (4), as too doubtful a question, whether the ordinary power to exchange would authorize partition, to force a title depending upon it on a purchaser.

The next case which bears upon the subject is *Doe* v. *Spencer* (5). For ordinary purposes the power to exchange in the Inclosure Act there referred to is not distinguishable from the ordinary power of exchange in a settlement. And there the question was, whether that which was carried out as a partition could be effected under the power of exchange; and the learned judge, Mr. Baron Rolfe, afterwards Lord Cranworth, delivered the judgment of the full Court of Exchequer that it could. That was a question of common law, and the point arose directly whether there was any substantial difference, as was put in Sheppard's Touchstone, be-

(1) 11 Ves., 475.
(2) 4 Bro. C. C., 278; 2 Ves., 98.
(3) Page 292.
(4) 1 Madd., 214.
(5) 2 Ex., 752.

tween exchange and partition, and the court decided that, as *regards tenants in common at all events—and [626 these people are tenants in common—there is no ground for such an assertion. I may notice that Mr. Preston, in his valuable edition of Sheppard's Touchstone (1) does put in brackets, after the *dictum*, "What objection is there to the exchange of one undivided moiety?" He could not find any objection. But whatever the authority that Sheppard's Touchstone standing alone would be as a recognized text-book, it has been overruled by *Doe* v. *Spencer* (2). It is there laid down that it is essential that an exchange, properly so called, should be made between the two parties. The judgment then proceeds: "But if A. and B. be tenants in common of Blackacre and Whiteacre, we can discover no principle which is to prevent A. from giving his moiety of Blackacre to B. in exchange for B.'s moiety of Whiteacre." And judgment was given accordingly. That is an express decision (of course I must not go further than the decision) that a power of exchange, where an undivided moiety is settled, does enable you to make a partition by exchanging with the owner of the other undivided moiety.

The only other case which it is necessary to cite is *Bradshaw* v. *Fane*, reported in Drewry rather shortly (3), and more fully in the Jurist (4). The question there arose on title, and the point was not decided, because it was considered doubtful. Vice-Chancellor Kindersley says: "First of all, there is the abstract question which has been so much disputed, both before me now and in several other cases, whether the ordinary power of exchange authorizes a partition; that is to say, not only a partition strictly in the form of a partition, but also in the form of an exchange. . . . Now, as to the abstract question, the conclusion at which I shall arrive is this—that so far as the decision upon this question turns upon this point, I must consider it too doubtful to force the title upon an unwilling purchaser. The authorities stand thus. The earliest case is that of *Abel* v. *Heathcote* (5), in which Lord Rosslyn certainly expressed his opinion that a power of sale would authorize a partition, at all events in that particular case. In *M'Queen* v. *Farquhar* (6) the question was raised by Lord Eldon whether the *power of sale authorized a partition, and that gave [627 rise to a discussion as to the power of exchange; and Lord Eldon, commenting on *Abel* v. *Heathcote* (5), expressed his

(1) Page 292.
(2) 2 Ex., 752.
(3) 3 Drew., 534.
(4) 2 Jur. (N.S.), 247.
(5) 4 Bro. C. C., 278; 2 Ves., 98.
(6) 11 Ves., 467.

opinion strongly that a power of exchange would not authorize a partition, and that *Abel* v. *Heathcote* depended upon the special words, and, though we have no report of the case to which reference was made, yet it appears from a note in Belt's edition of Brown's Chancery Cases (1) that Lord Eldon expressed an opinion that a power of exchange would not authorize a partition. In *Attorney-General* v. *Hamilton* (2) the question was whether certain persons should be made parties, which depended upon whether a power of sale so authorized a partition as that it was unnecessary to have these parties before the court, and it was considered so doubtful that they were held necessary parties. Then came the case of *Doe* v. *Spencer* (3), in which the judgment of the present Lord Chancellor was given, the question arising under an Inclosure Act, which authorized exchanges, the language of the act being much the same as that in ordinary powers, and there all the cases were commented on, and it was said that there is no authority for that which is laid down in Sheppard's Touchstone (4). There a clear decision was come to by the Court of Exchequer that in the case of two coparceners it might be done, but where there were three it could not. Now, so far as I am at liberty to express an opinion, I should say that I agree in the proposition that the rule as laid down in the Touchstone is not correct as to tenants in common, though it may be as to joint tenants." Then he goes on to say he does not see why, if the thing may be done as between two, it may not be done as between three or more. This is another point which is not now before me. It very seldom occurs, and perhaps it is not worth discussing. Then he says, "But after this case the question arose in the case of *Brassey* v. *Chalmers* (5), which was under a power to sell and dispose of, and the question was whether these words, either by themselves or taken in conjunction with the other words, would authorize a partition, and it is evident that the opinion of the Master of the Rolls was that it was a doubtful question, and I 628] *think the inclination of his mind was that it would not. These, I believe, are the only authorities which can be brought distinctly to bear upon the question, and with the exception of *Abel* v. *Heathcote* (6) and *Doe* v. *Spencer* (3), they are *dicta* merely. Then if we refer to the text-books, we find that Lord St. Leonards, whose authority in every respect stands higher than that of any other person, repre-

(1) 4 Bro. C. C., 285.
(2) 1 Madd., 214.
(3) 2 Ex., 752.
(4) Page 292.
(5) 16 Beav., 223.
(6) 4 Bro. C. C., 278; 2 Ves., 98.

sents the matter as being still uncertain. Chance (1) is of opinion that it is unsettled. Jarman (2) expresses his opinion to be that a power of exchange would not justify a partition. Preston, in his note to the Touchstone, says he does not think the position in the Touchstone to be good law. This is the state of the authorities; but I confess that, looking at it as a question turning on the ordinary power of sale and exchange, the matter remains in such a state of doubt and uncertainty that I could not force such a title upon an unwilling purchaser." So he winds up by stating his opinion really to be in favor of the exchange power including the partition, but he says that it is so doubtful upon the authorities, that he would not decide the abstract proposition so as to force the title upon an unwilling purchaser. Then he did decide the case upon another point, on the wording of the power, and he held that the title was good; so that, though he would not decide the abstract proposition, he held the title good upon the exercise of the power.

That is the state of the authorities. Lord St. Leonards says that it wants another decision to make it quite clear. I am willing to give the decision (supposing the doubt is not taken away by the decision of the Court of Exchequer followed by the Vice-Chancellor Kindersley), that the passage in the Touchstone is not good law, and that you can have such an exchange, and if you can have such an exchange, why could not the power authorize the exchange of an undivided moiety in Whiteacre for another undivided moiety in Blackacre? I decide that it does. We have conflicting opinions between what the judges said in *Doe* v. *Spencer* and what the Vice-Chancellor intimated his opinion to be. It is not necessary for me to decide that question. I must say, if I had to decide it, I should feel inclined to follow the *opinion of the Vice-Chancellor instead of the Court [629
of Exchequer, for if it can be done as between two, I do not see why it could not be done as between more than two, but I have not to decide that question now.

Solicitors for vendors: *Sandys & Freeman*, agents for J. & W. B. Sparks, Crewkerne.

Solicitors for purchaser: *Wood, Street & Hayter*, agents for Budge, Crewkerne.

(1) Page 147.

(2) 6 Jarm. Conv., 594.

[3 Chancery Division, 630.]

M.R., July 8, 1876.

630] **In re* BROOKE.

BROOKE v. ROOKE.

[1876 B. 826.]

Will—Construction—Charge of Legacies on Real Estate—Direction for Payment of Debts and Legacies by Executors—Gift of Legacies followed by Gift of Residue of Real and Personal Estate in one Mass.

The rule that legacies followed by a gift of real and personal residue in one mass are charged on the real estate, applies although preceded by a direction that the debts and legacies shall be paid by the executors.

A testatrix by her will directed her debts and funeral and testamentary expenses, and the legacies thereby bequeathed, to be paid by her executors thereinafter named, and after bequeathing specific and pecuniary legacies and making a specific devise, she gave the residue of her real and personal estate to A. and B. upon certain trusts, and appointed A. and C. executors:

Held, that the legacies were charged on the residuary real estate of the testatrix.

ELIZABETH BROOKE, widow, by her will, dated the 21st of April, 1875, directed her debts and funeral and testamentary expenses, and the legacies thereby bequeathed, to be paid by her executors thereinafter named as soon as conveniently might be after her decease; and after bequeathing certain pecuniary legacies and certain specific articles, the testatrix devised a freehold messuage, No. 4 Royal Crescent, Bath, with the appurtenances, together with the furniture, plate, linen, china, glass, books, pictures, prints, and other household effects therein at her decease unto her sons, the plaintiffs Henry Brooke and William John Brooke, their heirs, executors, and administrators respectively, upon the trusts therein mentioned, being in effect trusts for the said Henry Brooke during his life, and after his death for such one or more of his children as he should by deed or will appoint, and in default of appointment for such of his children as being sons should attain the age of twenty-one years, or being daughters should attain that age or marry; and if there should be no such child, upon similar trusts for the said William John Brooke during his life, and after his death for his children; and if there should be no such child
631] of the said William John Brooke, then upon *similar trusts for her daughter Elizabeth Mary Rawlinson during her life, and after her decease for her children. And after bequeathing her consumable stores and three life annuities, and other pecuniary legacies as therein mentioned, as to all the residue of her real estate and chattels real, including her man-

sion called The Mount and her lands and hereditaments situate in the parishes or hamlets of Harrow and Roxeth, in the county of Middlesex and elsewhere, and as to all the residue of her personal estate and effects the testatrix gave the same unto and to the use of the plaintiff Henry Brooke and the defendant Ernest Wallace Rooke, thereinafter called her trustees, their heirs, executors, administrators, and assigns respectively, upon trust for sale and conversion as therein mentioned; and the testatrix declared that her said trustees should stand possessed of the clear moneys to arise from the sale of her said residuary real estate and chattels real, and from the calling in, collection, and conversion of her said residuary personal estate, and of any ready money of which she should die possessed, as to one equal undivided moiety thereof, upon trust for the plaintiff Henry Brooke, his executors, administrators, and assigns absolutely; and as to the other moiety thereof, upon trust for her said trustees to invest the same in manner therein mentioned, and to stand possessed of such investments for the same upon trusts for the benefit of the plaintiff William John Brooke during his life, and from and after the determination of such trusts in favor of the plaintiff William John Brooke in trust for such one or more of the children of the plaintiff William John Brooke as the said plaintiff should by deed or will appoint, and in default of and subject to such appointment, in trust for all the children or any the child of the said plaintiff who being sons or a son should attain the age of twenty-one years, or daughters or a daughter attain that age or marry; and if there should be no such child, for such persons as the said plaintiff should by will appoint; and in default of such appointment, and so far as any such appointment if incomplete should not extend, in trust for the statutory next of kin of the said plaintiff as therein mentioned. And the testatrix appointed the plaintiff Henry Brooke and the defendant trustees of her will, and the plaintiffs executors thereof, and she declared that the defendant should be entitled to charge for all *business done by him as a solicitor in respect of her [632 estate in the same manner as if he had not been a trustee of her will.

The personal estate of the testatrix was sufficient for payment of her debts and funeral and testamentary expenses, but proved insufficient for payment of her legacies, and this action was brought in order to obtain the opinion of the court as to whether the legacies were charged on the real estate of the testatrix.

Woodroffe, for the plaintiffs: It was decided in *Greville* v. *Browne* (1) that if legacies are given generally, and the residue of the real and personal estate is then given in one mass, the legacies are a charge on the residuary real estate. That rule must give way to indications of contrary intention; and here the testatrix, by directing the legacies to be paid by her executors, who are different persons from her trustees, has shown that she meant the legacies to be paid out of personal estate only.

Northmore Lawrence, for the defendant, referred to *Gyett* v. *Williams* (2).

JESSEL, M.R.: I have no doubt that the rule, which is thoroughly well established, having been acted on by the Court of Chancery for 200 years, and having been confirmed by a decision of the House of Lords, is not affected by the distinction attempted to be made here. The rule is this: that if you give legacies generally, and then give the residue of the real and personal estate in one mass, that charges the legacies on the residuary real estate. Here legacies are given generally, and then the residue of the real and personal estate is given in one mass; and it is not denied that that would charge the legacies on the residuary real estate, were it not that it is said that a contrary intention is shown by the direction that the legacies shall be paid by the executors, who are not the trustees of the will. It is to be observed, however, that the direction is, that the debts as well as legacies shall be paid by the executors; the testatrix
633] could not, even if she wished it, have *exempted her real estate from payment of debts; and, that being so, there is not, in my opinion, any indication of an intention to exempt it from payment of legacies. I am of opinion that the residuary real estate is well charged with the legacies.

Solicitors: *Robinson & Preston*, agents for Burne & Rooke, Bath.

(1) 7 H. L. C., 689.

(2) 2 J. & H., 429.

[3 Chancery Division, 635.]

M.R., July 15, 1876.

*D'EYNCOURT v. GREGORY. [635

[1861 D. 89.]

Heirlooms—Sale—Jurisdiction.

The court has no jurisdiction to order a sale of heirlooms which are settled in strict settlement, simply on the ground that a sale would be for the benefit of all parties interested.

GREGORY GREGORY, the testator in the cause, was entitled in fee simple to real estate, in the county of Nottingham, of the annual value of £5,000 or thereabouts: he was also tenant for life of other estates in Lincolnshire of much larger value. On the latter estates he erected a very large mansion, and expended about £300,000 in erecting it and in purchasing suitable furniture and a large collection of pictures, tapestries, plate, and works of art, which were displayed in the rooms of the mansion.

By his will, dated the 22d of November, 1848, the testator devised his estates in Nottinghamshire to uses in strict settlement in favor of (among other persons) John Sherwin Gregory for life, with divers remainders over. The testator then devised the estates in Lincolnshire, of which he was tenant for life, to the same uses; and he gave the furniture and other articles to trustees as heirlooms to go along with the estates; and he directed that in case any person made by his will tenant for life, or issue of such person, should fail to procure the Lincolnshire estates to be settled in accordance with the uses declared by the testator's will, then all the estates devised by the will, and the articles thereby made heirlooms, should thenceforth go and remain as if the uses in favor of the person so failing had not been inserted.

The testator died in 1854. John Sherwin Gregory, who was tenant in tail of the Lincolnshire estates, refused to settle them in accordance with the will of the testator; and in consequence of such refusal the Nottingham estates and the articles bequeathed as heirlooms had become vested in persons who were not entitled to the Lincolnshire estates. All the debts of the testator had long since been paid.

The present tenant for life of the Nottinghamshire estates and of *the heirlooms now presented a petition in a [636 suit instituted to administer the trusts of the testator's will, stating that the mansion house on those estates was of a moderate size, quite inadequate to hold the heirlooms; that

he himself resides in another mansion house not subject to the uses of the will of the testator, and also of moderate size; that the heirlooms were at present packed up in the last mentioned mansion, and completely occupied many of the rooms in it, causing great inconvenience to the petitioner and his family; that there was no room to display them there, and that they were sustaining damage and deteriorating in value by reason of the impossibility of giving them proper attention; and praying that the heirlooms might be sold, or otherwise that he might be at liberty to apply for an act of Parliament to enable the trustees of the will to sell them.

Chitty, Q.C., and *Methold*, submitted that the court had jurisdiction to order a sale: *Fane* v. *Fane* (1); and that this was a proper case for exercising the jurisdiction.

Bagshawe, Q.C., and *Plucknett*, for the respondents, including persons entitled in remainder, some of whom were infants, offered no opposition.

JESSEL, M.R.: I am of opinion that this court has no jurisdiction to sell chattels settled in strict settlement any more than (independently of the Leases and Sales of Settled Estates Acts) it has to sell real estate settled in strict settlement: and the Leases and Sales of Settled Estates Acts do not apply to chattels. I have no doubt that in this case a sale would be for the benefit of all parties interested; but all I can do is to give leave to make an application to Parliament for the purpose. In *Fane* v. *Fane* there were mortgage debts remaining unpaid; and of course, if the testator's debts remained unpaid in the present case, a sale might be made for the purpose of paying them off; but it appears they have all been paid.

Solicitor: *T. D. Bolton.*

(1) 2 Ch. D., 711.

As to what are heirlooms, their character and the peculiarities of title thereto, see 1 Williams on Executors 6th Am. ed., 790, p. 720, bottom pp., *et seq.*; Greenleaf's Cruise on Real Property (ed. 1857), title Heirlooms; 1 Washb. Real Prop. (4th ed.), 20.

[3 Chancery Division, 643.]

M.R., July 17, 1876.

*Hale v. Hale. [643

[1875 H. 43.]

Will—Remoteness—Rule against Perpetuities—Gift to Class consisting of Children and Grandchildren who attain Twenty-four—Severance of Shares.

A testator gave his real and personal estate to trustees upon trust for his wife during widowhood, and after her death or second marriage for his children who might be living at such death or second marriage, and the issue of any child who might have previously died, such issue to take the share of her or his deceased parent in equal shares, the shares of such of his children or grandchildren as should be a son or sons to become vested in and payable to them as and when he or they should respectively attain the age of twenty-four years, and the shares of his daughters, or the female issue of any deceased child, to be settled as therein mentioned:

Held, that the whole of the gifts after the life interest of the widow were void for remoteness.

In re Moseley's Trusts (1) disapproved of.

This was the further consideration of a suit for the administration of the will of William Hale, who by his will, dated the 22d of August, 1867, gave his residuary real and personal estate to his wife, Anne Hale, and to Frederick Hale and Nathaniel Warren Hale, upon trust to get in and convert certain parts of his personal estate, and invest the same as therein mentioned, and to pay the income of such investments, and of all his real and his other personal estate, to Anne Hale during widowhood, and after her death or second marriage upon trust to sell all his outstanding real and personal estate. The will then proceeded as follows:

"And I direct that my said trustees shall stand possessed of the net proceeds arising therefrom for all and every of my children who may be living at the time of such death or second marriage, and the issue of any child who shall have previously departed this life, such issue to take the share of his, her, or their deceased parent in equal shares and proportions, the shares of such of my children or grandchildren as shall be a son or sons to become vested in and payable to him or them as and when he or they *shall [644 respectively attain the age of twenty-four years. And as to the shares of my daughters, or the female issue of any deceased child, upon trust to invest the same upon the securities hereinbefore mentioned, and to pay the annual income arising from such investment into the proper hands of my said daughters or granddaughters for their respective sole and separate use and benefit for and during the term of

(1) Law Rep., 11 Eq., 499.

their natural lives, without power of anticipation; and the same not to be subject or liable to the debts, control, or engagements of any husband with whom they or either of them may intermarry, and her and their receipts alone, whether covert or sole, shall be the only proper discharge to my said trustees for their respective shares. And I empower my said daughters or granddaughters, or either of them, by will to appoint, give, and bequeath a life interest in the whole or any part of their respective shares to any surviving husband or husbands, and after the decease of my said daughters or granddaughters or either of them, upon trust, subject to such appointment, if any, as aforesaid, for all or any of the lawful issue of my said daughters or granddaughters for such interest, in such proportions, and in such manner in all respects as my said daughters or granddaughters, or either of them, by their or her last will and testament in writing may appoint. And in default of such appointment, in trust for the child, if only one, or for all the children equally, if more than one, of my said daughters or granddaughters who shall be living at the time of their respective decease, and shall have attained or shall live to attain the age of twenty-four years. And in case either of my said daughters or granddaughters shall die under the age of twenty-four years without leaving issue, or leaving issue all such issue shall die under that age, then the share or shares of such of my daughters or granddaughters so dying shall go to and be divided equally amongst all my children who shall be then living, and be paid and payable to him or them upon the same terms and conditions as his, her, or their original share or shares under this my will."

And the testator empowered his trustees to apply the income of the contingent shares of his children and issue in or towards their maintenance during minority.

The testator died on the 3d of November, 1874, leaving 645] his *widow and two sons and four daughters him surviving. All the children had attained the age of twenty-four years at the time of the testator's death, with the exception of one daughter, who was of the age of sixteen. Two of the daughters had married, and had infant children living at the testator's death.

Chitty, Q.C., and *H. A. Giffard*, for Anne Hale, the widow of the testator, submitted that the gifts subsequent to the life interest conferred on her were void for remoteness, and consequently that she was absolutely entitled to one-third of the testator's personal estate as on an intestacy. It was quite clear that it could not be ascertained what grand-

children would take until the lapse of a period which might exceed a life or lives in being at the testator's death, and twenty-one years afterwards; consequently the shares even of those members of the class who had attained twenty-four at his death could not be ascertained, so as to be incapable of augmentation or diminution within the perpetuity limits. The gift was therefore bad: *Cattlin* v. *Brown* (1). The case of *Smith* v. *Smith* (2) was in point.

Davey, Q.C., and *Seward Brice*, for the testator's children and grandchildren, contended that the question could not be decided now, but that the parties must wait until the period of distribution arrived, in order to ascertain which of the shares had vested at that time: *In re Moseley's Trust* (3).

Cookson, Q.C., and *Owen*, for other parties.

JESSEL, M.R.: I am of opinion that the gifts after the death or second marriage of the testator's widow are void for remoteness. The doctrine on the subject is perfectly well settled. A will takes effect at the death of the testator, and any gift made by it is void for remoteness if it does not necessarily take effect within twenty-one years from the termination of any life then in being. The question here is, whether the class of objects whom the testator means to *benefit are necessarily ascertainable within that [646 time. The class consists of the children and grandchildren, being issue of deceased children of the testator, that is to say, if at the death of the widow there are any sons living, or there are any grandchildren living who are the sons of a deceased child, they are to take vested interests at the age of twenty-four years. In this will it is clear that "vested" means vested. The rule as to the construction of the word "vested" as laid down by Sir W. Grant is, that it has its proper legal meaning like every other word, unless you find a context to control it. In this case there is no context to control it, but, on the contrary, in the maintenance clause express mention is made of there being contingent shares. "Vested," therefore, means vested, and, consequently, neither son nor grandson can take a vested interest until he attains the age of twenty-four years. At the death of the testator the widow was alive, and she had children. No human being could tell at the death of the testator how many of such children would die in the lifetime or before the second marriage of the widow, nor whether any such child so dying would leave sons or not, and if the child so dying left sons, whether or not they would attain the age of

(1) 11 Hare, 372, 377. (2) Law Rep., 5 Ch., 342. (3) Law Rep., 11 Eq., 499.

twenty-four years. The result might be that a child might die in the lifetime of the widow, or before her second marriage, leaving a son under the age of one year, the widow might then die or marry, and such son might not attain twenty-four years of age within the legal period; and, consequently, you could not within that period ascertain the class to take, for that is the important point. The class you could ascertain in one sense: you could say that at the death of the widow the class could not exceed a given number, that is to say, it could not exceed all the children then living and all those who died in her lifetime leaving children; and you could say at the testator's decease that in no case could the whole class to take exceed the whole number of the testator's children, because grandchildren would only come in the place of children. In that sense the class is ascertainable; but in the other sense it is not. You could not tell how few there would be to take. You might have a division according to the number of children; then a child might die leaving a son who might attain twenty-four after the legal period, and then that share ought to come back to 647] the others *if you could divide it; but you could not. It must remain absolutely uncertain what share each child would take until it was ascertained whether the grandchildren attained twenty-four or not. The shares were not necessarily ascertainable at the death of the tenant for life, for you could not find out what share each child would take, although you could find out that each child must at least have a certain share. That being the state of the law, could you sever the shares? that is, could you say, I will give to each child his minimum share, and only declare so much to be void for remoteness as he may possibly take beyond the legal period? There, again, you would have to wait for the period of distribution to find out the share, unless you took the minimum share to be determined by the number of shares at the testator's death, in which case you would have a minimum share in the sense that a son who had then attained twenty-four must take that amount at all events, although he might be entitled to more. As I understand it, *Leake* v. *Robinson* (1), and the whole of that class of cases, negative the possibility of doing so. You must ascertain the whole share in order to get out of the decisions. According to the other mode of dealing, the minimum share might be given to each child who answered the description at the testator's death, leaving the law as to remoteness to take effect as regards the difference between

(1) 2 Mer., 363.

the maximum and the minimum share; but that is not the rule laid down by this court, which has held the whole gift void unless you can ascertain the shares within the period. The rule has been acknowledged in every case on the subject; and it is only necessary to refer to two or three of them. One is the case of *Smith* v. *Smith* (1), which is very like this indeed. It was decided originally by Vice-Chancellor Malins, who held you could sever the shares. It then went to the Court of Appeal, who reversed the decision on the ground I have mentioned, that the class must be ascertainable within the period, and you cannot separate the shares by calculating the minimum shares beforehand. That decision would be binding upon me if I had any doubt upon the question, which, however, has been settled so long ago as *Leake* v. *Robinson*. Besides that, there is the case of *Seaman* v. *Wood* (2), which is exactly this case. *There the late Master of the Rolls held that, as you [648 could not ascertain the shares necessarily within the limited period allowed by law, the whole gift was void. He said (3): "In my opinion the class here to take consists of the children who attain twenty-one, and a limited class of the grandchildren, namely, those who attain twenty-one, but are children of children who have died under twenty-one. Therefore, the class to be ascertained consists of the plaintiff's own children and the grandchildren who attain twenty-one born of deceased infant parents. There is a direction afterwards as to what shares they are to take. The children are to take equal shares, and the grandchildren collectively are to take the shares which their parents would have taken if they had lived. This class will not necessarily be determined within the period allowed by the rule against perpetuities. I think that this is a gift to a class which is too remote, and that the principle of *Leake* v. *Robinson* (4) applies." That is exactly in point. I think *Smith* v. *Smith* (1) is also fairly in point. Then there is the case of *In re Moseley's Trusts* (5), decided by Vice-Chancellor Malins, in the year 1870, the same year as the appeal was decided in *Smith* v. *Smith*. It is exactly in point, and it is exactly the other way. Therefore, in one sense, I have to elect between *Seaman* v. *Wood* (2) and *In re Moseley's Trusts*, but in another I have not to elect, because, if I am right in my view of *Smith* v. *Smith*, it decides the point independently of the conflict of opinion between the judges in

(1) Law Rep., 5 Ch., 342.
(2) 22 Beav., 591.
(3) 22 Beav., 595.
(4) 2 Mer., 363.
(5) Law Rep., 11 Eq., 490.

Seaman v. *Wood* and *In re Moseley's Trusts*. When you look at *In re Moseley's Trusts*, you see that the Vice-Chancellor does not deny the rule. He says this(1): "It was argued for the residuary legatee that the gift is void for remoteness because it includes objects who could not necessarily be ascertained within twenty-one years after the termination of a life in being at the death of the testator. If the gift had been to the children and grandchildren as a class, that would undoubtedly have been the case, because the grandchildren would not necessarily be twenty-one years of age within twenty-one years after the death of their grandmother, but here the number of objects must be ascer-
649] tained *within twenty-one years after the death of the testator." [I think that here the Vice-Chancellor forgot that they might diminish: he was thinking of the maximum number.] "It is to the children who attain twenty-one, and the issue of those who die under that age, so that necessarily the whole number of the class will be ascertained within a life in being and twenty-one years. The property, therefore, is to be divided into as many shares as the number of children who attain twenty-one and who die under that age leaving issue, and the issue are to take just that which the parent would have taken if he had lived to attain twenty-one years." As I read the gift in *In re Moseley's Trusts* (2), it was to the issue which should afterwards attain the age of twenty-one years: that was a part of the description of the issue, and therefore it was a mistake to say you could divide the number of shares into as many as there are children who are alive and children who died leaving issue; there is no gift to the issue as such; only to such as attain twenty-one. That is the mistake which, as it seems to me, the Vice-Chancellor made in that case. He said you ascertain the number of shares by seeing which children left issue, but leaving issue does not determine the point; it is leaving issue and such issue attaining twenty-one.

Looking at the principle and the authorities, I think in this case the grandchildren not being capable of being ascertained within the period allowed by law, the gift wholly fails for remoteness.

Solicitors: *Jenkinson, Owen & Oliviers.*

(1) Law Rep., 11 Eq., 502. (2) Law Rep., 11 Eq., 499.

[3 Chancery Division, 654.]

M.R., July 24, 1876.

*Day v. Radcliffe. [654

[1876 D. 78.]

Settlement—Construction—Words—"Payable"—Trust for Children at Twenty-one or on Marriage and Issue of Children dying before their Shares became "payable."

By a settlement reciting a royal warrant directing a sum of £1,000 to be paid to trustees for the benefit of A. D. and J. D. and children of A. D., it was declared that the trustees should stand possessed of the £1,000 upon trusts for investment and payment, and application of the income to or for the benefit of A. D. and J. D. during their respective lives, and from and after the deceases of A. D. and J. D. upon trust to pay, divide, or transfer the £1,000, and all dividends or interest which might be due thereon, unto and amongst all and every the child and children of A. D., and the issue of such child and children, if more than one, in equal shares and proportions, and if but one, then the whole to such one, and to be paid and transferred to such children or child as should be sons or a son at the age of twenty-one years, and to such children or child as should be daughters or a daughter at the age of twenty-one years, or day of marriage, whichever should first happen, the issue of any child or children whose parent or parents should die before his, her, or their share or shares should become payable to be entitled to the share or shares which his, her, or their parent or parents would have *been entitled to if living. A son [655 of A. D. attained twenty-one, and died in the lifetime of A. D. leaving a child:

Held, that the child of the son so dying was entitled to the parent's share of the trust fund.

DEMURRER to a statement of claim containing allegations to the following effect:—

By an indenture dated the 31st day of May, 1815, and expressed to be made between Giles Loder and Samuel Foot of the first part, John Day and Ann his wife of the second part, and Henry Charles Lichfield, solicitor of the treasury, of the third part, after reciting that the Prince Regent, on behalf of His Majesty, had by royal warrant directed the sum of £1,000 (part of the estate of John Follett, deceased) to be paid to the said Giles Loder and Samuel Foot for the benefit of the said Ann Day and John Day, and of the children of the said Ann Day, and that the said sum of £1,000 had accordingly been paid to the said Giles Loder and Samuel Foot, It was witnessed that in obedience to the said warrant it was thereby declared between the parties thereto of the first and second parts, with the consent and approbation of the said Henry Charles Lichfield, that the said Giles Loder and Samuel Foot, their executors and administrators, should stand possessed of the said £1,000 upon the trusts following (that was to say): Upon trust, in the first place, immediately to lay out and invest the same in the public funds at interest, in the names of the said Giles Loder and Samuel Foot, and to stand possessed of the said stock and funds in

or upon which the said trust moneys should be invested, and the dividends, interest, and produce thereof, upon trust to pay the dividends, interest, and produce thereof when received unto the said Ann Day, or empower her to receive the same for and during the term of her natural life, and so and in such manner that the same might not be subject to the control of her then present or any future husband, and so and in such manner that the receipt of her the said Ann Day, whether sole or married, might be a good and effectual discharge for the money which therein or thereby should be expressed to be received, and from and after the decease of her the said Ann Day, then upon trust to pay the dividends, interest, and produce thereof when received unto the said John Day, if then living, or empower him to receive
656] the same during his natural *life; and if the said John Day should die in the lifetime of the said Ann Day, then to pay the same to any after-taken husband of the said Ann Day that might survive her, or empower him to receive the same for and during the term of his natural life. And from and after the several deceases of the said Ann Day and John Day and any future husband of her the said Ann Day, then upon trust to pay, divide, transfer, or assign the said principal sum of £1,000, together with all dividends and interest which might be then due thereon, unto and amongst all and every the child and children of her the said Ann Day by her then present or any future husband, and the issue of such child or children, if more than one, in equal shares and proportions, and if but one, then the whole
* to such one, and to be paid or transferred to such children or child as should be sons or a son at the age of twenty-one years, and to such children or child as should be daughters or a daughter at the age of twenty-one years, or day of marriage, whichever should first happen, the issue of any child or children whose parent or parents should die before his, her, or their share or shares should become payable, to be entitled to the share or shares which his, her, or their parent or parents would have been entitled to if living. But in case the said Ann Day should depart this life without leaving any issue as aforesaid by her then present or any future husband, then upon further trust to pay, transfer, or assign the said principal sum of £1,000, together with all dividends and interest then due thereon, to such person or persons, and in such manner, proportions and form as she the said Ann Day should, notwithstanding her present or any future coverture, by deed or will appoint, direct, or bequeath.

John Day died in January, 1869. Ann Day died on the 29th of August, 1874, without having been married a second time.

There were issue of the marriage of John and Ann Day seven children, all of whom attained twenty-one. Four of them died in the lifetime of Ann Day without issue. Another, Job Day, died in the lifetime of Ann Day, but left issue one child, the plaintiff. The other two children survived Ann Day.

The action was brought by the only child of Job Day against the trustee of the settlement and the legal personal representative of Job Day. The plaintiff claimed administration of the trusts *of the settlement, a declaration [657 that the plaintiff was entitled to one-third of the funds subject to the trusts thereof, and consequential relief.

The legal personal representative of Job Day demurred to the statement of claim.

J. Carr, jun., for the demurrer: It is well settled that in such cases as this the word "payable" must be construed "vested": *Haydon* v. *Rose* (1); *Salisbury* v. *Lambe* (2); *Hallifax* v. *Wilson* (3); *Walker* v. *Main* (4). The case of *In re Wilmott's Trusts* (5) may at first sight appear to be the other way, but it will be found that the question there did not relate to vesting but to divesting.

Mulligan, for the plaintiff, was not called upon.

JESSEL, M.R.: I think this demurrer must be overruled. The difficulty arises on the authorities, and not on the instrument; if there were no such cases as *Woodcock* v. *Duke of Dorset* (6) and *Emperor* v. *Rolfe* (7), there could be no doubt what was meant.

The terms of the settlement are these: [His Lordship read them as stated above, and continued:] Can there be a doubt, independently of authority, that the words "before his, her, or their share or shares become payable" mean before the period of distribution? One remark which strongly tends to show this to be the meaning is, that if you read "payable" as "vested," as I am asked to do, then the provision in favor of issue can never take effect as regards daughters, for a daughter cannot have children until she is married, and if she marries her share becomes vested.

However, there is a series of authorities which establishes that, as regards marriage settlements, and also as regards

(1) Law Rep., 10 Eq., 224.
(2) 1 Eden, 465.
(3) 16 Ves., 168.
(4) 1 Jac. & W., 1.
(5) Law Rep, 7 Eq., 532.
(6) 3 Bro. C. C., 569.
(7) 1 Ves. Sen., 208.

post-nuptial settlements containing a recital of an intention 658] to provide for all *the children of a marriage, you are not as a general rule to read the instrument in such a way as to make the provision for a child depend on surviving both parents. But it is laid down, both by Sir William Grant in *Howgrave* v. *Cartier* (1) and by Lord Cottenham in *Whatford* v. *Moore* (2), that if the settlement clearly and unequivocally makes the right to a provision depend on survivorship, then the rule does not apply. What is "clear" and "unequivocal" is very difficult to say. What is clear to one mind might not be so to another. In the last case on the subject, *Jeyes* v. *Savage* (3), the Court of Appeal differed from Vice-Chancellor Hall, and such differences of opinion must always occur in construing ambiguous instruments. But the Lord Justice James in that case cites with approval a passage from the judgment of Lord Cottenham in *Whatford* v. *Moore*, the concluding words of which are these: "The cases upon this subject turn upon such nice distinctions, and are so little reconcilable, that the only reasonable course is to adopt the rule which has been generally recognized, of leaning in favor of a construction which includes all the children, if the instrument affords fair grounds for doing so; but if not, to give effect to the plain meaning of the words used." I think that is a sensible rule. When you find fair ground for doing so, then, in marriage settlements and post-nuptial settlements containing a recital of an intention to provide for all the children of a particular person or particular persons, you are to lean to that construction which includes them all; but you are not to have recourse to old authorities to overcome the plain meaning of the words used. Here the words used have a plain meaning, and the demurrer must be overruled.

It was then arranged, by consent, that the demurring defendant should be dismissed from the action, the plaintiff paying his costs and adding them to his own.

Solicitor: *Samuel Patey.*

(1) 3 V. & B., 79. (2) 3 My. & Cr., 270. (3) Law Rep., 10 Ch., 555, 563.

[3 Chancery Division, 659.]

M.R., July 28, 1876.

*Ex parte STEPHENS. [659

Trade-mark—Word—Trade Marks Registration Act (38 & 39 *Vict.* c. 91), *s.* 10.

A word or distinctive combination of letters is not "a distinctive device, mark, or heading" within the meaning of sect. 10 of the Trade Marks Registration Act, 1875 (38 & 39 Vict. c. 91), and cannot be registered as a trade-mark under the act.

THIS was a motion under the Trade Marks Registration Act, 1875, that the Registry of trade-Marks might be rectified by the name of H. C. Stephens being inserted as the proprietor of a trade-mark comprised of the following letters, printed or otherwise impressed upon paper or other suitable materials in the following distinctive combination: A E I L Y T O N.

The question turned on the construction of sect. 10 of the Trade Marks Registration Act, 1875, which provides as follows:—

"For the purposes of this act, a trade-mark consists of one or more of the following essential particulars, that is to say, a name of an individual or firm, printed, impressed, or woven in some particular and distinctive manner; or a written signature, or copy of a written signature of an individual or firm; or a distinctive device, mark, heading, label, or ticket; and there may be added to any one or more of the said particulars any letters, words, or figures, or combination of letters, words, or figures; also any special and distinctive word or words, or combination of figures or letters used as a trade-mark before the passing of this act may be registered as such under this act."

Chitty, Q.C., and *W. C. Fooks*, for the applicant: The combination of letters which the applicant seeks to have registered as a trade-mark is a "device" within the meaning of sect. 10 of the act. The word "Excelsior" has long been used as a trade-mark, "Excelsior Soap;" and that is called a device in the well-known lines of Longfellow:

> "The shades of night were falling fast
> As through an Alpine village passed
> A youth who bore 'mid snow and ice
> A banner with the strange device,—
> Excelsior!"

*[JESSEL, M.R.: I think the device there was the emblem which made the youth go higher and higher.] [660

The act nowhere says that there is to be no trade-mark in a word.

Fry, Q.C., and *Rigby*, for the Registrar of Trade Marks.

JESSEL, M.R.: The only question I have to decide is, what is the meaning of a trade-mark within the 10th section? According to that section a trade-mark consists of "one or more of the following essential particulars, that is to say, a name of an individual or firm impressed or woven in some particular or distinctive manner." If the argument addressed to me were right, that any word would do, any word would include a distinctive word. The name of a firm is a very distinctive word indeed; therefore that can hardly be so. It then proceeds thus: "or a written signature or copy of a written signature of an individual or firm"—Why should a written signature be specified, if any signature will do?—"or a distinctive device, mark, heading, label, or ticket; and there may be added to any one or more of the said particulars any letters, words, or figures, or combination of letters, words, or figures."

The word "figures" there means numerals; therefore it is this, that you may add to this thing, which is a distinctive device, mark, heading, label, or ticket, letters, words, or figures. Does not that show that it is not a letter, or word, or figure itself? It may be added, Why does the act give leave to add? You would never give leave to add words to words. Then it goes on, "Any special and distinctive word or words, or combination of figures or letters used as a trade-mark before the passing of this act may be registered as such under this act." That would be struck out of the act if I were to adopt this construction. Here is a power to register a special and distinctive word, if used before the act, showing that it cannot be registered under the act. Otherwise it would be contravening the well-known rule, that when there is a special affirmative power given which would not be required because there is a general power, it is
661] always read to import the *negative, and that nothing else can be done, so that the power to register a trade-mark used before the passing of the act clearly negatives the conclusion that a distinctive word can be used as a trade-mark first used after the passing of the act. A well-known illustration of that rule may be derived from the act which gave power to railway companies to borrow on mortgage or bond. It was said that, irrespective of that act, any corporation might borrow, by common law, either on mortgage or otherwise. The answer was, that there being a definite power given, you must import the negative so that the company

could only borrow on mortgage or bond. So here, there being power to register a distinctive word used before the act, it is conclusive to my mind that it cannot be registered if first used after.

Solicitors: *S. Potter; The Solicitor to the Treasury.*

[3 Chancery Division, 669.]

M.R., July 15, 31, 1876.

In re Borough of Hackney Newspaper Company. [669

Company—Mortgage to Director—Non-registration—Realization of Security—Subsequent Winding-up—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 43.

A company mortgaged chattels to two of the directors, who furnished the secretary with the necessary particulars for entering it in the register of mortgages, and directed him to register it, but he omitted to do so. The directors put in force the powers in their mortgage and realized their security; and subsequently the company was ordered to be wound up:

Held, that as the directors had not "knowingly and wilfully authorized or permitted the omission" of the entry of the mortgage on the register, and had realized their security before the commencement of the winding-up, the liquidator could not compel them to refund the proceeds of the security.

This was an application by the official liquidator of the Borough of Hackney Newspaper Company, Limited, that an indenture of mortgage, dated the 18th of December, 1874, and made between the company of the one part, and James Hatton Theobald and James Rodger Best of the other part, might be set aside.

The company was registered in July, 1874. The first directors were eight in number, and James Hatton Theobald and James Rodger Best were two of them. In December, 1874, the company were indebted to Theobald and Best in the sum of £1,746 4*s*. advanced by them for the purpose of enabling the company to carry on its business, and they had applied to the company for security. At a board meeting held on the 14th of December, 1874, the draft of the mortgage in question was read and approved of, and the deed was executed at a subsequent meeting on the 18th. By it a newspaper published by the company, and the copyright therein, and the fixed and movable machinery, printing presses, types, furniture and effects, which then, or at any time *thereafter, might be fixed or fastened to or in [670 or upon the printing offices then occupied by the company, or any premises which might at any time thereafter be occupied by the company, were assigned to Theobald and Best, subject to a proviso for redemption if the company should pay the sum of £1,746 4*s*., and any other sums due from the

company to them, together with interest at 15 per cent., forthwith after they should have left a notice at the company's office requiring payment, with power for them, in case of default of payment, to take possession of and sell the chattels and premises thereof assigned.

On the 6th of March, 1875, Theobald and Best served a notice requiring immediate payment of the sum of £2,000 due on the security. Default was made in payment; and they, on the same day, took possession of the property comprised in the mortgage. The property was sold on the 21st of May, 1875, and the net proceeds of sale amounted to £340.

The winding-up order was made on a creditor's petition presented on the 26th of June, 1875.

The validity of the mortgage was impeached on several grounds; and, amongst others, on the ground that it was not registered in accordance with sect. 43 of the Companies Act, 1862. With reference to this, it appeared that on the day when the draft mortgage was approved by the board the solicitor of Messrs. Theobald and Best told the secretary of the company that the mortgage must be registered, and supplied him with the particulars necessary for making the entries, and that Messrs. Theobald and Best afterwards pressed the secretary and managing director to register the mortgage, but they refused to do so unless they were furnished with a copy of the deed, which, however, was never sent to them.

Miller, Q.C., and *W. W. Cooper*, for the official liquidator, cited *Ex parte Valpy & Chaplin* (1); *In re Wynn Hall Coal Company* (2).

Chitty, Q.C., and *Sangster Green*, for the company: First: The creditors put in force their security and realized the mortgaged property before the winding-up commenced; 671] and there *is no decision which compels the court to hold that the mortgagees, though directors, must, under those circumstances, refund, simply because their mortgage was not registered.

Secondly: The mortgage deed is not made void by the 43d section of the Companies Act, 1862. That section only inflicts a penalty in the event of a knowing or wilful omission to register. Here the omission was not knowing or wilful; for the mortgagees pressed the managing director and secretary to register it, and supplied the necessary particulars: but they refused on a ground which cannot be supported.

Miller, in reply, urged that every director was as liable as the secretary. The mortgagees knew perfectly well that

(1) Law Rep., 7 Ch., 289. (2) Law Rep., 10 Eq., 515.

the deed was not registered; it was their business to see that it was done.

JESSEL, M.R.: The 43d section of the Companies Act, 1862, directs a register to be kept of all mortgages, and it imposes a penalty if the register is not kept, but it does not make void an unregistered mortgage. It has, however, been decided that if an officer whose duty it is to make the entry does not cause it to be made, he not only incurs the statutory penalty, but that as a further penalty for his neglect of duty he loses the benefit of his mortgage. It has further been decided that a solicitor is an officer of the company for this purpose. These are decisions of the Court of Appeal, and I am bound to follow them, although it is difficult to see on what principle those cases have been so decided, and although I might not myself have come to the same conclusion in the first instance.

What, then, must a mortgagee do to incur such a penalty? If he is to be punished, it must be for doing something wrong; in the language of the section, he must "knowingly and wilfully authorize or permit the omission" of the entry on the register. Here the mortgagees, who were two of the directors, directed the secretary to enter the mortgage on the register; the secretary did not do it. If, then, these directors are the persons whose duty it was to make the entry, they have directed it to be made: if it be not their duty, then they cannot have authorized or permitted the *omission. It appears to me that they [672 have done all they could; and I cannot say that under this enactment, which is a most penal one, they could have incurred a penalty; and I have the authority of the Court of Appeal for saying that the omission to make the entry does not of itself make their mortgage void.

Then the second point is this, that the mortgagees are not claiming the benefit of the mortgage in the winding-up as they were in the decided cases. Before the winding-up commenced they put the mortgage in force and realized their security. It is difficult to see why they should not avail themselves of their rights in this way. Suppose the mortgage had been realized ten years before the winding-up, could the liquidator call on the mortgagees to repay what they had realized, and say that the whole transaction was void? There is no authority to that effect, and I cannot so hold.

The other questions raised by the summons (as to which a report is not called for) were then gone into, and ultimately the summons was dismissed.

Solicitors: *Walter, Moojen & Son; Benham & Tindell.*

[3 Chancery Division, 672.]

M.R., July 31, 1876.

PIGG V. CLARKE.

[1875 P. 171.]

Will—Construction—"Family."

The primary meaning of the word "family" in a will is "children."

A testator directed the interest arising from all his real and personal property to be paid to his wife during her life, and after her decease to be equally divided amongst all his family that should be then living when they should attain the age of twenty-one years. At the date of his will he had seven children living, some over and others under twenty-one, and some married, with children:

Held, that under the word "family" children alone could take.

THIS was a suit for the administration of the estate of William Pigg, a beerhouse keeper in Ipswich, who made his will (dated the 10th of May, 1851) in the following terms:—

"In disposing of my earthly goods in which it has pleased 673] the *Almighty to bless me with, I give and bequeath in trust to Mr. Wm. F. Codd and Henry Bevan the younger, both of St. Margaret's, Ipswich, Suffolk, for the whole and sole benefit of my wife Hannah Pigg during her natural life, not being subject to any husband or husbands that she may hereafter intermarry with, the interest arising from all my real and personal property of whatever description or nature, whatsoever or wheresoever, after paying all my just debts and funeral expenses, then all the remaining interest arising from such property to be paid half-yearly to my said wife, Hannah Pigg, during her life. And after her decease, then to be equally divided amongst all my said family that shall be then living when they shall obtain the age of twenty-one years."

The testator died on the 21st of December, 1855, leaving his widow and seven children him surviving. The widow died in August, 1875. Of the seven children of the testator three survived his widow; two died in her lifetime without having been married; another died in her lifetime leaving a widow (who survived the testator's widow) but no children; and the seventh died in her lifetime leaving a widow and children who survived the testator's widow. Some of the testator's children were married at the date of his will and had children then living; some of his children had then attained twenty-one, others were then infants.

The question was, who were entitled under the words "my said family."

Lemon, for the three children of the testator who survived the widow, submitted that by "family" the testator must be taken to mean his children: *Barnes* v. *Patch* (1).

Colt, *Rendall* and *Romer*, for grandchildren, contended that all the lineal descendants of the testator were to be included under the term "family," citing *Cruwys* v. *Colman* (2); *Gregory* v. *Smith* (3); *Williams* v. *Williams* (4); *Snow* v. *Teed* (5).

Phear, for the widow and the sons, submitted that the daughters-in-law *of the testator ought to be in- [674
cluded, and cited *In re Terry's Will* (6).

JESSEL, M.R.: I have in this case to consider the will of a shopkeeper, who at the date of his will had a wife and seven children living; some of the children were twenty-one, others under that age; and he had at least one child married who had children. Under these circumstances he makes his will thus: [His Lordship read it.] The question is, who are meant by the word "family:" it being contended on the one hand that it means "children," and on the other hand that it must include all the descendants of the testator.

The word "family" has various meanings. In one sense it means the whole household, including servants, and, perhaps, lodgers. In another sense it means everybody descended from a common stock, that is to say, all blood relations; and it may, perhaps, include the husbands and wives of such persons. In the sense I have just mentioned, the family of A. includes A. himself; A. must be a member of his own family. In a third sense, the word includes children only; thus when a man speaks of his wife and family, he means his wife and children.

Now, every word which has more than one meaning has a primary meaning; and if it has a primary meaning, you want a context to find another. What, then, is the primary meaning of "family?" It is "children;" that is clear upon the authorities which have been cited; and, independently of them, I should have come to the same conclusion. I hold, therefore, that the children of the testator can alone take under the words "my said family."

Solicitors: *Aldridge & Thorn*, agents for Jackaman & Sons, Ipswich.

(1) 8 Ves., 604.
(2) 9 Ves., 319.
(3) 9 Hare, 708.
(4) 1 Sim. (N.S.), 358.
(5) Law Rep., 9 Eq., 622.
(6) 19 Beav., 580.

See 2 Redfield on Wills (3d ed.), 71 *et seq.*

[3 Chancery Division, 688.]

M.R., Aug. 3, 1876.

688] *ROGERS V. JONES.

[1876 R. 5.]

Will—Election against Estate of Person put to Election.

A testator, entitled under a settlement to a life interest in certain cottages to which his wife became absolutely entitled on his death, purported to devise them to her for life, with remainder to A., who, without knowing of the settlement, sold his supposed reversionary interest to the plaintiff. The testator's widow, who took other benefits under the will, subsequently sold the cottages to a purchaser without notice of the devise. On the widow's death the plaintiff claimed compensation against her estate:

Held, that the widow had elected to take the cottages against the will, and that A. was entitled to compensation for the loss he had sustained in respect of their value at the widow's death, out of her estate to an extent not exceeding the amount of her other benefits under the will.

BY a marriage settlement dated November 11, 1833, certain messuages and hereditaments (including six cottages in Rhos Street, Ruthin) were settled to the use of William Williams for life, with remainder to the use of his wife, Jane Williams, for life, with remainder to the use of the first and other sons of W. Williams in tail, and for default of such issue to the use of his first and other daughters in tail, and for default of such issue to the use of the heirs of the survivor of them the said W. Williams and Jane Wiliams.

William Williams, by his will made in 1860, gave to his said wife, Jane Williams, all his real estate during her life, and after her decease he purported to devise "all those six cottages situate in Rhos Street" (being part of the property included in the said settlement) to his nephew, Thomas Rogers, his heirs and assigns.

The testator died in 1860 without issue, and his widow, Jane Williams, became absolutely entitled under the settlement to the property therein comprised.

In 1864 Thomas Rogers, not being aware of the settlement, sold and conveyed to the plaintiff his supposed reversionary interest under the testator's will in the said cottages.

In June, 1875, Jane Williams died, having appointed the defendants, W. D. Jones and R. P. Davies, her executors.

689] *After the death of Jane Williams the plaintiff first ascertained that she had in 1872 sold the six cottages in Rhos Street to a purchaser for value without notice of the devise in the testator's will.

The plaintiff now brought his action against the executors of Jane Williams, and submitted that he was entitled to be indemnified out of her estate in respect of the loss sustained by him in consequence of the sale of the cottages by the

defendant, or that such sale was an election by her to take the cottages against the will of the testator, and that, consequently, the plaintiff, as the person injured by such election, was entitled to receive compensation for such injury out of the other benefits derived by Jane Williams under the will of the testator, for the loss occasioned to the plaintiff by such election, and to have the amount of such benefits ascertained and paid out of her estate.

Chitty, Q.C., and *Romer*, for the plaintiff.

Cookson, Q.C., and *Bradford*, for the defendant: In this case no case of election arose; and even if the widow might have been put to her election in her lifetime, there is no authority for such a claim being made, after so long a time, against the estate of a deceased person.

JESSEL, M.R.: The testator in this case gave his real estate to his wife for her life, with remainder as to six cottages, which did not belong to him, to his nephew Thomas Rogers. At the time of the devise the testator's only interest in these cottages was a life estate under the settlement, with a contingent remainder if he survived his wife.

Under these circumstances a case of election arises. The doctrine of election is this—that if a person whose property a testator affects to give away takes other benefits under the same will, and at the same time elects to keep his own property, he must make compensation to the person affected by his election to an extent not exceeding the benefits he receives. In this case the widow, having elected to take against the will, was bound to make compensation to the plaintiff to the extent of the benefits she received under *the will. Therefore, in her lifetime she might to this [690 extent have been thus made liable.

But it is said that the plaintiff's right to be indemnified is lost by the death of the widow. Why? I see no principle upon which her death should exonerate her estate. The liability of her estate must now be ascertained, and there must be an inquiry as to the amount of the benefits which the widow received in her lifetime under the will, and as to the compensation to which the plaintiff is entitled in respect of the loss he has sustained by not getting possession of the six cottages at the death of the widow, so far as such loss does not exceed her benefits under the will.

The pleadings to be amended by making T. Rogers co-plaintiff.

Solicitors for plaintiff: *C. C. Ellis & Co.*

Solicitor for defendant: *F. W. Adams*, agent for L. Adams, Ruthin.

See 7 Eng. Rep., 616; 13 Eng. Rep., 727 note; 14 Eng. Rep., 237 note; 1 White & Tudor's Lead. Cas. in Eq. (4th Am. ed.), 510, 541, 542, 545 and notes; 6 Central Law Jour., 344, 364.

Where a husband loans money and takes a note therefor payable to the order of himself and wife, and thereafter makes a will containing a devise or bequest to the wife, by its terms, to be accepted and received in lieu of dower and of all claims upon the estate, if the note remains unpaid at the time of his death and, she survives, she acquires title to the note as a gift, not as a part of his estate at the time of his death, and she is not put to her election between the note and the provisions for her in the will, but is entitled to both. The fact that she gave the note to the appraisers as a part of her husband's estate, while it is evidence tending to show that she had released to him her right of survivorship, is not conclusive, and does not estop her from claiming the note, in the absence of evidence that the position of any party has been changed in consequence, or that any transaction was had in reliance thereon: Sanford *v.* Sanford, 58 N. Y., 69, affirming 2 Thomp. & Cooke, 641.

See also Havens *v.* Sackett, 15 N. Y., 365, where it was held the party was not put to an election.

The testator directed his executors to sell all his real and personal estate, and out of the proceeds to purchase a house and lot, to be occupied by his widow and his five youngest (her) children, as a home, until the youngest child should attain to majority, and directed them to invest the balance, after payment of his debts, and out of the income provide for the support of the same persons and a son of his by a former wife, for the same time, and on the arrival of that period, to sell the house and lot and divide the proceeds and the principal of the investment equally among all his children, making no provision whatever for the widow beyond the period of the majority of the youngest surviving child; after the payment of debts there remained nothing but the testator's homestead farm. This was sold, and the house and lot bought with the proceeds. The widow released her dower in the farm, but only on the express understanding and assurance, from the surviving executor and his counsel, that she would be entitled to the value of her dower on sale of the house and lot. Held, that, under the circumstances, she was not put to her election, but was entitled to the value of her dower in the farm, and the provision also, and that she had never, in fact, been put to her election: Freeland *v.* Mandeville, 28 N. J. Eq., 559, 562, and numerous cases cited as to when a devise or bequest is not in lieu of dower.

Where the widow of a testator, under a material mistake of facts, elects to take the provisions made by will, in lieu of dower, etc., chancery will afford relief. But to be reinstated in her rights, as they would exist without the election, she must restore to the estate or make compensation for all she has received under the will, and which she is not otherwise entitled to: Wanzer *v.* Smith, 2 Western Law Monthly, 426.

Where a testator in his will has made provision for his widow, under which she has elected to take, she is barred of her dower. The language of the statute forbids any other construction than its terms literally import, however different may be the rule of the common law, and that which obtains in most of the states: Moore *v.* Stidel, 4 Warden's Weekly Law Gaz., 65, Superior Court, Cin.

Testatrix by her will gave to her sister-in-law a house and lot, together with the interest of her personal estate, in consideration that she would take care of and provide for the comfortable maintenance of the husband of testatrix who was old and enfeebled during his natural life: Held, that if the husband, with a full knowledge of the property, consented that the devisee should enter and take possession under the will, and by his request she took possession and for a period of several months discharged the duty imposed upon her by the will, he was presumed to have elected to take under the terms of the will, and was estopped from making any other claim to the property: Wise *v.* Rhodes, 84 Penn. St. R., 402.

Provision is made by statute in New York, and in most of the states, for a widow being barred of dower by reason of provisions in lieu thereof by legacy, jointure, etc.: 1 R. S., 741, §§ 9–13; 1 Edm. St., 692–3; 2 R. S., (6th ed), 1121–2; 1 Washb. Real Est.,

(4th ed.), 321, p. 269 marg. p.; 1 White & Tudor's Lead. Cas. in Eq. (4th Am. ed.), 568; 3 Redf. on Wills (3d ed.) 380.

The statute further provides (§ 14), that "When a woman shall be entitled to an election, under either of the two last sections, she shall be deemed to have elected to take such jointure, devise or pecuniary provision, unless within one year after the death of her husband she shall enter on the lands to be assigned to her for her dower, or commence proceedings for the recovery or assignment thereof": 1 R. S., 742, § 14; 1 Edm. St., 693; 2 R. S. (6th ed.), 1122; 1 Washb. Real Estate (4th ed.), 325, p. 272 marg. p.; 1 White & Tudor's Lead. Cas. in Eq. (4th Am. ed.), 569.

The committee of a lunatic widow cannot make an election for her between the provision made for her in the will of her husband, and her dower at common law, without the sanction of the court. The right of election is a personal one: Kennedy *v.* Johnston, 65 Penn. St. R., 451, 3 Am. Rep., 650.

To same effect: Havenridge *v.* Nelson, 56 Ind., 90, 94 and cases cited; Pinkerton *v.* Sargent, 102 Mass., 568.

A suit brought by a widow to set aside an instrument by which she elected to accept certain provisions of the will of her husband in lieu of dower, is not a proceeding for the recovery of dower within the meaning of the Revised Statutes, compelling her to take such proceedings within a year: Chamberlain *v.* Chamberlain, 43 N. Y., 424, 441–7, modifying 3 Lansing, 348, 376–7, 384–6.

Where a will contains a devise to the widow in lieu of dower, under our statute concerning dower, no acceptance of the devise is required; if nothing is done within a year after probate, the law presumes her acquiescence: but she may, at any time within the year, reject the provisions of the will.

As our law does not provide for her acceptance or election, such acceptance or election, if made, would amount to nothing, and she could, at any time within the year, reject the will, notwithstanding. And even where the will, in terms, requires "an acceptance" of its provisions, the rule is the same: Bretz *v.* Matney, 60 Mo., 444.

Under the statute relating to dower, where land is devised to the wife by will, she cannot hold her dower unless her renunciation of the devise be filed within one year after probate: Dougherty *v.* Barnes, 64 Mo., 159; Gant *v.* Henley, Id., 162.

A jointure is a competent livelihood of freehold for the wife of lands to take effect in profit or possession after the death of the husband, for the life of the wife, at least.

A widow's claim to dower is surrendered by the voluntary acceptance of the provisions of her husband's will, devising to her all his estate, real and personal.

By accepting the provisions of the will in this case, the widow surrendered her right to claim dower in lands to which her husband held title during the coverture, but which he had sold and conveyed before his death.

A widow has twelve months' time to make her election to accept the provisions of the will, or to assert her claim to dower.

The time at which she is required to make her election may be postponed, if she cannot elect intelligently, by applying to the Chancellor for the ascertainment of the respective values and amounts of her two interests.

Where the wife is lawfully deprived of her jointure or any part thereof, and not by any act of her own, she, by statute, shall have indemnity therefor by way of damages out of her husband's estate.

But under this statute she is not entitled to be indemnified by asserting claim to dower in lands which her husband had conveyed to others before his death.

The widow lost her right to claim dower in lands conveyed by her husband before his death, by accepting the provisions of his will, although his estate proved to be insolvent: Grider *v.* Ewbanks, 12 Bush (Ky.), 510.

But where no such statute, see Gant *v.* Henley, 64 Mo., 163.

A legacy in lieu of dower abates like other legacies, and is not a charge upon the real estate, but is only entitled to a preference in payment from the personal estate over other legacies: Babcock *v.* Stoddard, 3 Thomp. & Cooke, 207; Sanford *v.* Sanford, 4 Hun, 753. (Not same case as that in 2 Thomp. & Cooke, 641, 58 N. Y., 69; nor as that in 4 Thomp. & Cooke, 686, 2 Hun, 94, 62 N. Y., 553.)

See also Roper *v.* Roper, *post*, p. 779.

[3 Chancery Division, 694.]

V.C.M., March 16, 1876.

694] *COOKE v. CHILCOTT.

Covenant running with Land—Positive Contracts—Performance in alieno solo—Mandatory Injunction—Purchaser bound by Notice—Admission of Liability.

A purchaser of a piece of land with a well or spring upon it covenanted with the vendor, who retained land adjoining intended to be disposed of for building sites, to erect a pump and reservoir, and to supply water from the well to all houses built on the vendor's land:

Held, 1, that both the benefit and the burden of the covenant ran with the land, and that the case was not within the second resolution in *Spencer's Case* (1), but if not, a sub-purchaser with notice of the covenant was bound by it:

Held, 2, that, though the covenant was not one of which the court would decree specific performance directly as being for the construction of works which the court could not superintend, it could be enforced indirectly by an injunction restraining the defendant from allowing the work to remain unperformed.

THIS was a motion for an injunction to restrain the defendant from keeping or leaving two houses belonging to the plaintiffs, or either of them, or any other houses that might be thereafter built upon a piece of land belonging to the plaintiffs, without a full and ample supply of good, clear, and wholesome spring water, contrary to a covenant contained in an indenture of the 29th of September, 1849.

By a deed of the 25th of July, 1848, a piece of land at Woodhill, in the parish of Portishead, Somerset, was conveyed by the corporation of Bristol to the ordinary dower uses in favor of James Pullin Hinton, and the deed contained certain building covenants.

By a deed of the 29th of September, 1849, James Pullin Hinton conveyed to Benjamin Farmer, and his heirs, a house and premises, part of the piece of land comprised in the deed of the 25th of July, 1848, being No. 6, together with the well or spring of water and pump-house thereon at Woodhill.

By a deed of covenant of the same date, also made between Hinton of the one part, and Farmer of the other part, after reciting the deed of even date, and that Hinton was
695] possessed of other land *at Woodhill, colored pink on a plan on the now stating indenture (being the remainder of the land comprised in the indenture of the 25th of July, 1848), and that Farmer was about to erect a steam engine, and dig and make a large and capacious tank upon some parts of the said premises, for the purpose of placing the said engine for pumping water from the aforesaid well ad-

(1) 5 Rep., 16, a; 1 Sm. L. C., 60.

joining the house No. 6 at Woodhill aforesaid, which engine was to pump from the said well, or any other well of Farmer, his heirs, appointees, and assigns, the quantity of water thereinafter mentioned for not only the supply of all and every the messuages or dwelling houses then already erected upon the said hereditaments and premises, but of all and every other messuages or dwelling houses thereafter to be erected upon the said hereditaments and premises, and to convey the same water by proper pipes into each and every of such messuages or dwelling houses, not exceeding one hogshead, or sixty-three gallons, per day, for each and every such messuages or dwelling houses, upon being paid the annual sum of £2 as thereinafter mentioned, It was witnessed that Hinton thereby covenanted not to grant or release any of the land or premises belonging to him at Woodhill in any way whatsoever for the purpose of making any well or tank for the use of any house then belonging to him there, or for any house thereafter to be erected on the said land so belonging to him, and that in all grants and conveyances of the said premises he would insert a covenant by any purchaser that such purchaser should be bound to have and take and be supplied with water from the said well, or any well belonging to Farmer, his heirs or assigns, so long as Farmer should continue to supply at least sixty-three gallons of clear spring water daily for the use of each house, subject to the payment of the said rent of £2 by equal half-yearly payments on the 25th of March and 29th of September in each year; and after a covenant by Hinton for payment of the rent for each house until he should have conveyed such house to other parties, the now stating indenture contained the following covenant:—

"And the said Benjamin Farmer, for himself, his heirs, executors, administrators, appointees, and assigns, doth hereby covenant, promise, and agree to and with the said James Pullin Hinton, his heirs, appointees, or assigns, that he the said Benjamin Farmer, *his heirs, executors, [696 administrators, appointees, and assigns, shall and will erect, finish, and complete the steam engine, and finish and complete the tank or tanks, and from time to time, and at all times forever hereafter, find and provide a full and ample supply of good, clear, and wholesome spring water as aforesaid, for not only the houses already built, but for all and every messuage, tenement, or dwelling house and offices hereinafter to be built upon any part of the said hereditaments and premises. Provided always, and these presents are upon the express condition, that if the said well or

spring shall at any time hereafter fail or not produce a sufficient supply of such spring water as aforesaid for all the messuages, tenements, or dwelling houses and offices as aforesaid, or that any part of the machinery or pipes shall be out of repair, then that the said Benjamin Farmer, his heirs, appointees, executors, administrators, or assigns, will, without any delay, find and supply spring water of an equal quality from some other source, so that the said several messuages, tenements, or dwelling houses shall not be kept without such supply of spring water, the owners or occupiers of each of such houses paying to the said Benjamin Farmer, his heirs, executors, or administrators, the said rent or sum of £2 per annum for each house half-yearly, upon the days and times aforesaid. But it is hereby expressly stipulated and agreed, that if the said Benjamin Farmer, his heirs, executors, administrators, or assigns, shall at any time hereafter fail, neglect, or refuse to supply all and every or either of the messuages, tenements, or dwelling houses already erected and built, or hereafter to be erected and built upon any part of the said hereditaments and premises with a supply of such spring water as aforesaid (but subject to the proviso aforesaid), that then and in such case it shall and may be lawful to and for the said James Pullin Hinton, his heirs, executors, administrators, appointees, or assigns, or any tenant or tenants, or occupier or occupiers, of any of such messuages, tenements or dwelling houses and offices as he the said Benjamin Farmer, his heirs, appointees, executors, administrators, or assigns, shall fail, neglect or refuse to supply as aforesaid, and shall not thenceforth be liable to take water from or be supplied by the said Benjamin Farmer, his heirs, executors, administrators, appointees, or assigns, nor to pay the said sum of £2 697] per annum, nor any other *sums of money, to the said Benjamin Farmer, his heirs, executors, administrators, appointees, or assigns, for any such particular messuage or dwelling house. But it is hereby expressly stipulated and agreed that neither the said James Pullin Hinton, his heirs, executors, or administrators, nor any person or persons lawfully claiming under him or them, shall supply any other person or persons with spring water except he the said Benjamin Farmer, his heirs, appointees, executors, administrators, or assigns shall fail, neglect, or refuse so to do as aforesaid."

James Pullin Hinton died on the 6th of September, 1857, and by a deed of the 23d of January, 1871, part of the land comprised in the deed of the 25th of July, 1848, was con-

veyed by Hinton's devisees to one Gallo, who covenanted that all houses which might at any time be built upon the piece of land thereby conveyed should be supplied with water by Benjamin Farmer, his heirs or assigns, so long as Farmer, his heirs or assigns should continue to each of such houses sixty-three gallons per diem of clear spring water in manner provided for by the said indenture of the 29th of September, 1849; and that the sum of £2 each should be paid to Farmer, his heirs or assigns, in respect of such houses so supplied.

By a deed of the 25th of July, 1871, Gallo and the other parties interested conveyed to the plaintiffs in fee simple a portion of the land comprised in the deed of the 23d of January, 1871.

Shortly after the 29th of September, 1849, Farmer erected a steam engine and pump, and constructed a large tank or reservoir, upon the premises purchased by him, for the purpose of pumping and storing or receiving water from the well or spring.

The defendant, by deed of the 27th of August, 1857, purchased from the mortgagees of Farmer the land, with the well and tank. He purchased with full notice of the covenant by Farmer, and he was now the owner of the premises, No. 6, at Woodhill, and the well or spring, pump, tank, or reservoir, and steam engine.

At the date of the deeds of the 29th of September, 1849, several houses had been erected on parts of the land belonging to *Hinton adjacent to the parts afterwards pur- [698
chased by the plaintiffs, and since that date a considerable number of other houses had been erected in a similar position.

These last mentioned houses had been continuously supplied with water from the well or tank, first by Farmer and afterwards by the defendant, to the present time.

The plaintiffs had, since the date of their purchase, erected two dwelling houses on the land purchased by them. In April, 1875, a Mr. Cogan, who had arranged with the plaintiffs to take one of their houses on a two-years' lease, applied to the defendant to perform his covenant in the deed of the 29th of September, 1849, and lay on a supply of spring water from the well or spring. The defendant admitted his liability under the covenant, but the plaintiffs, as a matter of friendly concession, in order to enable Cogan to take possession immediately, accepted, as a temporary arrangement, a proposal that a cask should be placed at the house and

filled daily by the defendant's workmen. Cogan then took possession, and the plaintiffs placed a cask outside the house capable of containing twenty gallons of water, and the defendant's workmen continued till the early part of January, 1876, to fill it daily, when he suddenly, and without assigning any reason, discontinued the supply, and declined to accept the rent for the water supply when tendered by the plaintiffs:

The plaintiffs now moved upon affidavit showing the above facts.

Glasse, Q.C., and *G. I. F. Cooke*, for the plaintiffs: The defendant has notice of this covenant, and therefore he is bound by it, even if it does not run with the land: *Keppell* v. *Bailey* (1); *Tulk* v. *Moxhay* (2); *Daniel* v. *Stepney* (3); *Parker* v. *Whyte* (4); *Whatman* v. *Gibson* (5). There is, however, nothing in the nature of such a covenant which prevents it running with the land: *Morland* v. *Cook* (6). The persons through whom the defendant claims have received the consideration for this supply of water. The case
699] is therefore one in which the court will, if *possible, relieve the plaintiffs: *Storer* v. *Great Western Railway Company* (7).

Bristowe, Q.C., and *Bush*, for the defendant: What is now asked is in effect a mandatory injunction. The covenant is one which cannot run with the land. In the first place, it is a covenánt to do something *in alieno solo*. In order to carry it out it would be necessary to lay down pipes on the land of the plaintiffs. The case, therefore, comes exactly within the second resolution in *Spencer's Case* (8). The rule is, that if a covenant affects the particular land sold, it runs with the land. But if it affects land not sold, and is a positive covenant to do something, it does not bind the assignees. In *Tulk* v. *Moxhay* (2) the land to which the covenant attached belonged to the covenantor.

[MALINS, V.C.: Assuming that the covenant does not run with the land, is not the defendant still bound by notice?]

If that were so, there is a second objection to the covenant, which is, that it is one of which the court, not being able to superintend its execution, will not decree specific performance: *Powell Duffryn Steam Coal Company* v. *Taff*

(1) 2 My. & K., 517.
(2) 2 Ph., 774.
(3) Law Rep., 7 Ex., 327; Law Rep., 9 Ex., 185.
(4) 1 H. & M., 167.
(5) 9 Sim., 196.
(6) Law Rep., 6 Eq., 252.
(7) 2 Y. & C. Ch., 48.
(8) 5 Rep., 16, a; 1 Sm. L. C., 60.

Vale Railway Company (1); and therefore will not interfere by injunction.

[*Glasse*: *Storer* v. *Great Western Railway Company* has been followed recently in *Wilson* v. *Furness Railway Company* (2).]

The second resolution in *Spencer's Case* has never been modified, and it covers this case completely. The Master of the Rolls refused to grant an injunction in *Enfield Local Board* v. *Harrison*, which came before the Master of the Rolls on the 25th of March, 1874, and was very similar to this case. The court will also take into consideration the expense to which the defendant would be put by being required to perform this covenant.

Glasse, in reply, was stopped.

*MALINS, V.C., after referring to the facts, continued: [700

That this is a covenant which the court ought to support, if possible, is evident. The defence is rested partly on the ground of the expense which the performance of the covenant would involve. But I cannot listen to a defence of that kind, because the defendant bought the property with express notice of the covenant by which he is bound to supply water to these houses, and it was for him to consider, when he bought it, whether the covenant did or not involve too great a burden. But the plaintiffs' right is resisted principally on two grounds. First, it is said that the covenant does not run with the land. Now, there is no dispute as to what acts the performance of the covenant requires. The well has been sunk, and the defendant is bound to maintain and keep in repair a steam engine to be used for supplying the houses with water from it.

The defendant also bought with notice of the obligation, and cannot take the property without performing the obligation attached to it. It is, therefore, immaterial whether the covenant runs with the land, but I think it does run with the land.

This is the case of two persons claiming title under grants from the same vendor, by which one piece of land became bound for the benefit of the other, and the question is whether the covenant can be enforced against the person who contracted to bear the burden. That as between the original parties, it could have been enforced, I cannot entertain a doubt; and I think that it is a covenant which runs with the land for all time. I entertain no doubt that as

(1) Law Rep., 9 Ch., 331. (2) Law Rep., 9 Eq., 28.

between contiguous owners, both being sub-purchasers under the same vendor, they take subject to the burden.

I quite agree with what was said by Lord Cottenham in *Tulk* v. *Moxhay* (1), "That this court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed. Here there is no question about the contract. The owner of certain houses in a square sells the land adjoining, with a covenant from the purchaser 701] not to use it for any other purpose than as *a square garden; and it is now contended, not that the vendee could violate that contract, but that he might sell the piece of land, and that the purchaser from him may violate it without this court having any power to interfere." Now, as I pointed out to Mr. Bristowe, if the covenant is not binding on the ground that it does not run with the land, the consequence would be that, though these contiguous owners have relied on having it performed, the defendant might from this hour refuse to supply a single gallon of water, and thus every house which has been erected in the expectation that this covenant would be performed might be at once deprived of water. It would be perfectly monstrous that such a defence should be allowed. In my opinion, therefore, the covenant runs with the land, but it is immaterial whether it does or not, because the defendant took with notice of the obligation.

Then, suppose that the covenant does not run with the land, Mr. Bristowe and Mr. Bush have referred to *Spencer's Case* (2) as an authority for holding that it cannot in that case be enforced. There is no occasion to dispute that case. But later decisions have carried the law beyond *Spencer's Case*. There are many instances in which covenants not running with the land have been held binding. It is a very common thing for a covenant to be binding if the purchaser has had notice, and not otherwise. *Daniel* v. *Stepney* (3) may be taken as an instance of this. There the Court of Exchequer decided that a particular covenant could not be enforced. The plaintiffs in appealing had the wisdom to retain counsel conversant with that branch of the law, and the decision was reversed, the Court of Appeal deciding unanimously that the covenant in question was obligatory whether it ran with the land or not.

I do not think it necessary to go into all the cases which

(1) 2 Ph., 777.
(2) 5 Rep., 16, a; 1 Sm. L. C., 60.
(3) Law Rep., 7 Ex., 327; Ibid, 9 Ex., 185.

which were cited. But I think that when a contract is entered into for the benefit of contiguous landowners, and one is bound by it, and the other entitled to the benefit of it, the covenant binds him forever, and also runs with the land. But it is equally clear that he is bound by taking the land with notice of the covenant.

*Then it is said that the court cannot decree specific [702 performance of this covenant. It is very true that there are many covenants of which the court does decree specific performance. The case of the *Enfield Local Board* v. *Harrison*, mentioned by Mr. Bush, is an instance of such a covenant. It involved the performance of expensive works, and appears to me as clear a case as ever came before a court of equity, because of the rule that the court will not superintend the performance of such works. It was a clear case for damages if a breach of the contract had been committed, but not for specific performance.

Now there are cases such as *Storer* v. *Great Western Railway Company* (1), where there was a contract as to making a road. In these cases the court grants an injunction, which indirectly obtains the object of the performance of the work required. This is not a new principle. The same course was taken by Lord Eldon in *Lane* v. *Newdigate* (2), where he granted an injunction restraining the defendant from keeping the banks of a canal and locks out of repair.

This case is one seeking for the performance of works which are required to last a long time, and therefore an injunction expressly ordering the work to be done cannot be granted. But the defendant is subject to the obligation of laying down certain pipes and supplying water to the houses of the plaintiffs, and those pipes he must lay down and that water he must supply; and though I cannot directly make him lay down the pipes, I can and will make an order by means of which he will be guilty of contempt of court if he does not lay them and provide the supply of water. I think I am now in a situation to make such an order, and the injunction will accordingly go in the terms of the notice of motion.

April 5. The defendant appealed, and on this day the case came on before the Court of Appeal. It was then suggested that, pending the suit, some temporary arrangement should be made, and by consent the injunction was dissolved on an undertaking by the defendant to give the temporary accommodation.

(1) 2 Y. & C. Ch., 48. (2) 10 Ves., 192.

703] *June 15. The plaintiffs having filed a statement of claim setting out the above facts, and also alleging that the plaintiffs had lost their tenant in consequence of the failure in the supply of water, and that neither house could be let without a supply of water, the defendant demurred. The demurrer now came on for hearing. His Lordship then considering that the demurrer only raised the same points which he had decided on the motion for the injunction, overruled it without further argument.

Aug. 2. The defendant having appealed against the order overruling the demurrer, the appeal now came on to be heard before the Court of Appeal. The attention of their Lordships having been drawn to the fact that by the statement of claim it was alleged that the defendant had admitted his liability on the covenant, the Court of Appeal affirmed the decision of the Vice-Chancellor without going into the points argued before him on the motion.

Solicitors: *Clarke, Woodcock & Ryland; Warry, Robins & Burges.*

As to when mandatory injunction will be granted: see 13 Eng. R., 552 note; Norman *v.* Wells, 17 Wend., 136.

The words "grant" and "demise" in a lease for years create an implied warranty of title and a covenant for quiet enjoyment: Stott *v.* Rutherford, 92 U. S. Rep., 107, 109; Burney *v.* Keith, 4 Wend., 502; Grannis *v.* Clark, 8 Cow., 36; Young *v.* Hargrave, 7 Ohio, part 2, p. 63.

For examples of covenants which run with the land and those which do not, see Allen *v.* Culver, 3 Denio, 294 *et seq.*; Dolph *v.* White, 12 N. Y., 300 *et seq.*; 2 Am. Law Reg., N.S., 193, 257; note to Kearney *v.* Post, 1 Sandf. (2d ed.), 110; note to Easterly *v.* Sampson, 1 Cromp. & Jer., 119, Johnson's Am. ed.; Norfleet *v.* Cromwell, 64 N. C., 1; Brooks *v.* Smith, Thompson's Tenn. Cas., 226.

An action of covenant will not lie on a covenant for title against the devisees of a covenantor. It should be an action of debt: Sickles *v.* Snyder, 10 Upper Can. Q. B., 209; Twynam *v.* Pickard, 2 Barn. & Ald., 105; Wilson *v.* Knubley, 7 East, 128; Farley *v.* Bryant, 5 Nev. & Man., 42; Van Koughnet *v.* Ross, 7 U. C. Q. B., 248.

An assignee of part of the land conveyed by a deed containing a covenant for seisin in fee, may sue upon the covenant and recover damages in proportion to his interest: Keyes *v.* O'Brien, 20 Upp. Can. Q. B., 12, approving Sugden on Vendors, 508, and disapproving 3 Preston on Abstracts of Title, 57–8.

A purchaser of lands under a judgment acquires the benefit of covenants which run with the land: Sweet *v.* Green, 1 Paige, 473; Kellogg *v.* Wood, 4 Paige, 578.

And all covenants which run with the land, by different grantees: Kellogg *v.* Wood, 4 Paige, 578.

An action for breach of covenants running with the land can only be maintained by a party between whom and the covenantor there is privity of estate at the *time of the breach*: Rowe *v.* Street, 8 Upper Can. Com. Pl., 217.

But see Ernst *v.* Parsons, 54 How. Pr., 164–5.

Plaintiff sued defendants, who were assignees of the *rent* for the term for which plaintiff was to enjoy, on a covenant by his lessor to repair, as being a covenant running with the land: but held, that defendants, not being assignees of the reversion for any term or time, were not liable on the covenant: McDougall *v.* Ridout, 9 U. C. Q. B., 239; Milner *v.* Branch, 5 Maule & Selw., 417.

The following covenants have been held to run with the land:

For further assurance: Colby *v.* Osgood, 29 Barb., 339; Ernst *v.* Parsons, 54 How. Pr., 163.

For quiet enjoyment: Hunt *v.* Amidon, 4 Hill, 345.

Of warranty: Kellogg *v.* Wood, 4 Paige, 578.

Covenant to rebuild or repair, etc., in lease: Allen *v.* Culver, 3 Denio, 284; Easterly *v.* Sampson, 1 Cromp. & Jer., 105.

Not to let other lands to be used for a particular purpose: Norman *v.* Wells, 17 Wend., 136; Birdsall *v.* Tiemann, 12 How. Pr., 551; Perkins *v.* Coddington, 4 Rob., 647.

See Thomas *v.* Hayward, L. R., 4 Exch., 311; Gilbert *v.* Peleter, 38 Barb., 488, affirmed by Court Appeals, June, 1868.

To build and maintain fences: Shepard *v.* Buffalo, etc., 35 N. Y., 642.

To pay taxes and assessments: Martin *v.* O'Connor, 43 Barb., 514.

Not to assign, underlet, or otherwise part with the possession of demised premises without first obtaining consent in writing of the lessor: Williams *v.* Earle, L. R., 3 Q. B., 739.

To assist in repairing a canal dug for the purpose of draining lands of the parties to the covenant, though notice to assist is necessary before proceeding to make repairs: Norfleet *v.* Cromwell, 3 Am. Law Times State Courts Rep., 104, 64 N. C. Rep., 1.

So to erect a dam for mutual benefit of opposite riparian proprietors, and to repair and rebuild it: Lindeman *v.* Lindsey, 69 Penn. St. R., 93.

So to raise a dam to a certain height, to keep the dam and flume in good repair, and to supply the lessee with a certain quantity of water: Noonan *v.* Orton, 27 Wisc., 300.

And that the lessees may make use of a conduit made for carrying off certain waste and superfluous water, and enjoy such waste and superfluous water for their own use. The grantor must be guilty of no unskilfulness or negligence preventing proper flow of proper quantity: Athol *v.* Midland, etc., Irish Law Rep., 3 Com. Law, 333.

To surrender up premises in good condition at the expiration of the lease: Brooks *v.* Smith, Thompson's Tenn. Cas., 226.

Not to cut certain timber except for specified use: Brooks *v.* Smith, Thompson's Tenn. Cas., 226.

To draw off water six days in a year: Morse *v.* Aldrich, 19 Pick., 449.

In a lease, to extend it for two years: Wilkinson *v.* Pettit, 47 Barb., 230.

But see Noonan *v.* Orton, 27 Wisc., 300.

A condition for re-entry on non-payment of rent: Thomas *v.* Packer, 1 Hurl. & Norm., 669.

An annual rent upon a grant in fee: Van Rensselaer *v.* Hays, 19 N. Y., 68.

Against incumbrances: Ernst *v.* Parsons, 54 How. Pr., 163.

Though he must sue upon the covenant and not for money paid: Carney *v.* O'Niel, 27 Mich., 495.

To pay for a house to be erected by tenant, binds grantee: Frederick v. Callahan, 40 Iowa, 311.

By a lessee to insure the buildings on the premises in the name of the lessor, the insurance money to be expended in the erection of new buildings. The rule of damages was the value of the premises lost to the plaintiff, by defendant's neglect to insure such value not exceeding the sum in which defendant was to have insured by his covenant; and it makes no difference that on failure of the lessee to insure, the lessor was allowed by the lease to do so and charge the premiums as rent: Douglass *v.* Murphy, 16 U. C. Q. B., 113.

Upon the death of one, who has effected an insurance against fire, of his house, the interest upon the policy devolves upon his heirs at law, and in case of loss the damages accrue to them. If the policy runs to the assured, his executors or administrators, the personal representative, may, it seems, maintain an action as trustee for those beneficially interested in the real estate.

The damages recovered are not assets but realty, subject to dower and the lien of creditors by judgment, before distribution among the heirs at law: Wyman *v.* Wyman, 26 N. Y., 253, modifying 36 Barb., 368.

But see Colburn *v.* Lansing, 46 Barb., 37, 41; Lappin *v.* Charter Oak, 58 id., 325; Clinton *v.* Hope Ins. Co., 45 N. Y., 454; Farmers, etc., *v.* Graybill, 74 Penn. St. R., 17.

The following not:

To return, replace, or pay for chattels leased with land: Allen *v.* Culver, 3 Den., 284.

By a lessee to pay a note as a part of the consideration for the demise of the premises: Dolph *v.* White, 12 N. Y., 296.

A proviso in a lease that the lessor might re-enter if the lessee, his assigns, or any tenant or under-tenant occupying the premises should, during the term, be lawfully convicted of any offence against any of the present or future game laws: Stevens *v.* Copp, L. R., 4 Exch., 20.

By the lessor not to build or keep any house for the sale of spirits or beer, within half a mile of the demised premises: Thomas *v.* Hayward, L. R., 4 Exch., 311.

See Norman *v.* Wells, 17 Wend., 136; Wilson *v.* Hart, L. R., 1 Chy., 463.

To pay off a mortgage: Knowles *v.* Carpenter, 8 R. I., 548.

Though the covenantee can recover without payment of the mortgage: Braman v. Bingham, 26 N. Y., 483.

See Johnson *v.* Blydenburgh, 31 N. Y., 427, 432.

To build a shop; to set up machinery therein; to do certain work of the lessor therein: Brooks *v.* Smith, Thompson's Tenn. Cas., 226.

L. conveyed to B. certain premises by metes and bounds, with covenants of seisin, against incumbrances and warranty. A portion of the roof and eaves of a house standing on the land conveyed extended over upon the adjoining lot of M. In an action by L. against B., to recover the purchase money, the latter alleged and claimed that the right to maintain and use the projection of said roof and eaves was conveyed to him by L.; and that M.'s right to cut the same away, and to oust him from its enjoyment, constituted a breach of the covenants in said deed:

Held—1. That if the right to such projection and its use belonged to L. at the time of the conveyance, it passed to B. as an appurtenance to the parcel granted.

2. If it did not then belong to him, the projection not being within the description of the premises contained in the deed, the same did not pass, and hence he did not covenant to warrant and defend it: Meek *v.* Breckenridge, 29 Ohio St. Rep., 642.

[3 Chancery Division, 703.]

V.C.M., July 10, 1876.

JULL v. JACOBS.

[1873 J. 85.]

Will—Construction—Remainder—Meaning restricted by Context—Void Life Estate—Intestacy—Donee attesting Witness—Acceleration.

A testator, after disposing specifically of most of his property, enumerated certain funds out of which he directed that his debts, funeral and testamentary expenses, should be paid, and added: "The remainder to be equally divided to my surviving children." The frame of the will left it doubtful whether these words were intended to apply generally or only to the residue of the particular funds:

Held, that, considering the general frame of the will, only what was left of the particular funds passed.

Gift to the testator's daughter of real and personal estate "during her lifetime, and after her decease the property to be equally divided between her children on their becoming of age":

Held, that, as regarded the real estate, the gift to the children was strictly a remainder, and that the construction as to the personalty followed the same 704] *rule as the realty; and, therefore, that, the gift to the daughter being void

on account of her having attested the will, the gift to the children was accelerated, and took effect immediately:

Held, also, that the remainder to the daughter's children created vested interests. *Festing* v. *Allen* (1) disapproved.

GEORGE JULL, who died on the 3d of August, 1873, and had living at the time of his death a son, Robert Stiles Jull, and two daughters, Mrs. Louisa Hephzibah Jacobs, the wife of Charles Arthur Jacobs, and Annie Maria Jull, and a granddaughter who was the only child of a deceased son, made his will, dated the 9th of November, 1872, by which he gave the bulk of his property specifically amongst his three children.

The will was not prepared by any skilled person, and was divided into paragraphs.

It began as follows:—

"This is the last will and testament of me, George Jull, of Lynwood Tyndall's Park, Clifton, Bristol.

"First I give, devise, and bequeath unto my eldest daughter, Annie Maria Jull, the house, Lynwood Park, as above named."

Then followed an enumeration of other property also given to this daughter, and another clause commenced,

"I give, devise, and bequeath unto my daughter Louisa Hephzibah Jacobs during her lifetime, and after her decease the property to be equally divided between her children on their becoming of age."

The property so given was then enumerated, and a clause followed making other specific gifts to Robert Stiles Jull, after which came the following clause:—

"I also desire that all my just debts, funeral and testamentary expenses, to (*sic*) be paid by my executors, Charles Arthur Jacobs and Annie Maria Jull, from money or promissory (*sic*) notes or bills due to (*sic*) at the time of my decease at the bank and elsewhere, The remainder to be equally divided to my surviving children."

There was no other residuary clause.

*The will was attested by the two executors so named, and the gifts to the daughters were consequently void under the 15th section of the Wills Act. [705

The suit now came on for hearing on further consideration, and some questions of construction were raised. One of these was whether the general residue or only the remainder of the things specified passed under the words "The remainder to be equally divided to my surviving children." In order to explain this the original will was produced.

(1) 12 M. & W., 279; 5 Hare, 573.

There was a comma at the end of the word "elsewhere," which came to the end of a line, and the word "The" began a line with a capital. But each clause in the will began with a capital letter, whether commencing a fresh line or not, and from the fact of the word "elsewhere" coming to the end of the line it was doubtful whether the succeeding words were or not intended as the beginning of a fresh paragraph.

J. Pearson, Q.C., and *J. T. Humphry*, for the plaintiff Annie Maria Jull; and *Glasse*, Q.C., and *Collins*, for the infant grandchild, who was the heir-at-law of the testator: This clause must be taken in connection with the preceding, and as only referring to the remainder of the things specified: *Lewis* v. *Nokes* (before the House of Lords, May 19, 1876); *In the Goods of Ludlow* (1).

Whitehorne, for Robert Stiles Jull: This point is really covered by *Attree* v. *Attree* (2).

MALINS, V.C.: I think that, as a general rule, where a will disposes of a variety of property belonging to a testator, and winds up with a gift of the remainder or the residue, it is treated as a gift of the general residue; but each case must depend upon the particular circumstances and the framing of the will. It seems to me that this will shows an intention on the part of the testator to dispose of a particular part of his property in each particular paragraph, and, after disposing of the bulk of his property in that way, he 706] adds that now *in question. [His Lordship then read the paragraph, and continued:]

Now I think that is all one sentence, and although he does begin a fresh line, he obviously could not do otherwise, because the preceding line is full, and leaves no room for another word. The circumstances of the clause beginning a fresh line or with a capital "T" go for nothing, because the same things are done in a preceding paragraph where it was not necessary. Therefore, looking at the framing of this will, I think, upon the whole, that it means the remainder of that subject which is disposed of in the particular paragraph, namely, "money or promissory notes or bills which may be in my possession, and what may be due to at the time of my decease at the bank or elsewhere." That is the fund out of which the debts and funeral expenses are to be paid, and what remains of that particular fund is the remainder, and that only, in my opinion, is given to the surviving children. It is not a general gift of residue, but merely of that particular fund. With regard to the authorities cited, I think *Lewis* v. *Nokes* is entirely appli-

(1) Sw. & Tr., 29. (2) Law Rep., 11 Eq., 280.

cable to this case. With regard to the other case, *Attree* v. *Attree* (1), I confess that, although I come to the conclusion that this is not a general residuary gift, I should have had no difficulty in deciding otherwise in *Attree* v. *Attree*. There the testatrix gave a house and garden specifically, and then several pecuniary legacies. It was impossible to give the residue of pecuniary legacies, and therefore when, after these gifts, she says "all the rest shall be divided," it means "all the rest" or the residue of her property remaining after providing for these particular gifts. Therefore I think that is as clear at least in favor of a residuary gift, as it appears to me, perhaps not quite so clearly, that this is not the general residue. Therefore there is an intestacy as to the general residue.

Mrs. Jacobs had children all now infants, and the next question was whether the failure of her life interest accelerated the gifts to her children, or the property so given must be considered as undisposed of during Mrs. Jacobs' life, and go, as regards personalty, to the next of kin, and as regards realty, to the heir-at-law.

**J. Pearson*, Q.C., and *J. T. Humphry*, for Mrs. [707 Jacobs: However the case may be as regards real estate, there can be no acceleration as to personalty. This distinction was taken in *Eavestaff* v. *Austin* (2), where the Master of the Rolls held that the testator, by revoking by a codicil an annuity which he had given by his will, showed an intention to accelerate the interests of those who took the fund subject to the annuity. Here there is no occasion to impute such an intention, and the case does not apply directly. But it is important, because the Master of the Rolls there draws a distinction between realty and personalty, and shows that any technical rules as to remainders, which might in this case be considered to carry the real estate, do not apply to personalty.

Secondly, this is not the case of a gift void in its inception, but only made so by the fact of the daughter having been one of the attesting witnesses. It must therefore be treated for the purposes of construing the will as if it were a good gift, although the person intended to take is by the mistake of the testator disqualified from doing so.

Glasse, Q.C., and *Collins*, for the infant grandchild: Though the gift is void in the sense that the person intended to take is incapable of doing so, the intention of the testator must be gathered from the will alone; and for the purpose of construing the will, it must be treated as if the life interest

(1) Law Rep., 11 Eq., 280.

(2) 19 Beav., 591.

were good. If the children are treated as taking the property immediately, the effect is to make a new will for the testator, and to give them that which he never intended them in any event to have. The clause in the Wills Act avoids a gift to an attesting witness, or the husband or wife of an attesting witness, "so far only as concerns such person attesting the execution of such will." Therefore, for the purpose of construction, the gift is not treated as struck out. In *Eavestaff* v. *Austin*, the construction put upon the will effectuated the manifest intention of the testator. *Lainson* v. *Lainson* (1), which is discussed in that case, was also a case of a revocation by a codicil.

Whitehorne, for Robert Stiles Jull, supported the same view.

708] **Higgins*, Q.C., and *Colt*, for the infant children of Mrs. Jacobs: The supposed distinction between real and personal estate has no foundation. There is no decision to support it, and the only case cited puts personalty on the same footing as realty. The Master of the Rolls there, in fact, applied the case of *Lainson* v. *Lainson* (1), which was one of real estate, to a gift of personalty. There is a decision of Vice-Chancellor Kindersley, in *Young* v. *Davies* (2), in which he held that the fact of one of several joint tenants being an attesting witness to a will did not sever the joint tenancy, and that the whole went to those who could take. That shows that the court puts the avoidance of a legacy on the ground of the legatee being an attesting witness, on the same footing as if it were void in its inception.

The authorities on the question of acceleration are all discussed in Jarman on Wills (3). They all go to show that where a life estate fails from any cause, a gift to take effect after its cessation is accelerated. There is no such distinction as suggested between real and personal estate. In *Lainson* v. *Lainson* there was a gift both of real and personal estate, and the two were put on the same footing; and the Master of the Rolls said he was unable to distinguish the case where a person gave an estate which failed from that where he directed himself that it should fail. On appeal the same view was followed; and *Fell* v. *Biddolph* (4) is a recent case to the same effect. Even if there were no acceleration, the effect as regards the personalty would simply be that the interest would accumulate till the chil-

(1) 18 Beav., 1; 5 D. M. & G., 754.
(2) 2 Dr. & Sm., 167.
(3) 3d ed., vol. i, p. 538.
(4) Law Rep., 10 C. P., 701.

dren attained twenty-one. There would be nothing left undisposed of.

Glasse, in reply: In order to make out a case of acceleration it must be shown that such was the intention of the testator, as the Lords Justices did in *Lainson* v. *Lainson*, and the Master of the Rolls in *Eavestaff* v. *Austin* (1) and *D'Eyncourt* v. *Gregory* (2). This last mentioned case was decided solely on the authority of *Turton* v. *Lam-* [709 *barde* (3). Here the intention is clearly manifested that the children are not to take during the lifetime of their mother, and the contrary cannot be maintained without making a new will for the testator. This is not in any sense a remainder.

MALINS, V.C.: This is a case under the Wills Act, but one which fortunately seldom occurs, of a testator asking some of the members of his family interested under the will to become attesting witnesses. This testator having made his will asked one of his daughters and his son-in-law to become attesting witnesses; the consequence of which is that under the 15th section of the Wills Act the gifts to the two daughters are rendered void, and the credibility of the witnesses is established at the same time. [His Lordship then read the clause of the will now under consideration, and continued:]

The first question is, what would have been the effect of this devise and bequest if the daughter could have taken under it. Property is given to her for life, and after her decease to be equally divided between her children; and notwithstanding what has been urged by Mr. Glasse, I take that to be as clear a remainder to the children as the law could possibly create. He says, "I give the property to A. for life, and after the decease of A. to B.," or "after the decease of A. to A.'s children." It is a remainder vested if there are children, or contingent if there are no children. Whenever the life estate expires those in remainder take. Therefore, under the old law, when life estates were forfeitable by any of those acts which formerly would have caused a forfeiture; where property was limited to A. for life, and after the decease of A. to A.'s children, if A. had forfeited the life estate his children would have immediately a right, because "from and after the decease" means from and after the determination of the life estate, and however it is terminated, whether by the death of the tenant for life or by forfeiture, it is equally gone. If it was given to A. for life, and after the decease of A. to B., and A. forfeited, B. would

(1) 19 Beav., 591. (2) 34 Beav., 36. (3) 1 D. F. & J., 495.

have immediately had a right of entry, having the next remainder. And it is not contingent on account of taking
710] *effect only after the death of A. Therefore, in my opinion, it is perfectly clear that the daughter is by this will as to the real estate made tenant for life with remainder to her children, to be equally divided on their coming of age. A remainder is, in my opinion, unquestionably created.

But then comes the question, whether the Wills Act by taking away the life estate of the daughter causes an intestacy during her life, so as to carry the property to the heir-at-law, or accelerates the remainder. It is perfectly clear, in the first place, that the children are postponed to the mother simply because the mother is to have the property for her life, but if the mother cannot have the property for her life, why are the children to be postponed? The reason of their postponement altogether ceases; they are not to have it until after her death, because the testator assumed that she would have it during her life. But he was ignorant of the law that if he called in his daughter to be an attesting witness the very gift he made to her would absolutely fail. Now he has postponed his grandchildren, that is, his daughter's children, to the daughter solely, because the daughter was to take for life, and if he had known that she could not take it for life he would not have postponed the children until after her death. He would not have left her and her family totally destitute in the meantime. It is a mere accident that the daughter cannot take the life estate, and I am of opinion that the children are postponed to the daughter simply that she may have the property for life, and if she could not have it for life, the children would have had it immediately. That would be the conclusion I should come to from the reason of the thing without the decisions. But the decisions are all the same way. *Lainson* v. *Lainson* (1) was a decision of Lord Romilly, and was affirmed on appeal, and is now a very eminent authority. That was a case in which a testator gave an estate to his son John Lainson for life, and from and after his decease to his children. Then John Lainson's life estate being subsequently taken away, it was argued that the children of John could not take while he was alive, that it was an executory devise, and they were therefore incapable of taking at the present moment. Lord Romilly puts the case
711] *thus (2): "The question arose upon the construction of the third codicil of the will of Alderman Lainson. It may be shortly stated to this effect: The testator, by his

(1) 18 Beav., 1; 5 D. M. & G., 754. (2) 18 Beav., 6.

will, gave his real and personal estate to trustees, and directed them, subject to certain payments thereout, to pay the rents to his son John Lainson for life, and from and after the decease of his son he gave the estate to his first and other sons in tail male. By a third codicil the testator revoked the bequest in favor of his son, and in lieu of it he gave him an annuity." In that case, therefore, the bequest is taken out of the way by a codicil, and here by an accident. Lord Romilly, however, goes on: "But he did not by that or any other codicil dispose of the rents of the estate during the life of John Lainson, his son. The question is, whether this creates an intestacy or an acceleration of the estate to the son of John Lainson, and I am of opinion that it is an acceleration of the estate to the son, and not an intestacy. I have looked carefully at the authorities, and I am unable to distinguish the case where a person gives an estate to another, and that fails, from the case where the testator himself directs that it shall fail." Lord Romilly thus puts the very case. Here there is an attempt to give the estate, and that attempt fails because the testator made a mistake. He then goes on: "Although the expression used is that the estate to the son of John Lainson is only to take effect from and after John Lainson's decease, I am of opinion that the meaning is 'from and after the determination of his estate by death or otherwise.' In deciding thus I fulfil the intention of the testator. It is expressly stated on the will that the testator did not intend the son to take the estate in addition to the annuity (which he would do if I were to hold there was an intestacy), but in lieu of it. The result is that I must make a declaration that there is an acceleration of the estate to the eldest son of John Lainson." Then Lord Romilly says that he has looked at the authorities, and he finds that they are uniform. I need not refer to them all. They have been referred to, and they are collected in Jarman on Wills (1), and they are all to one effect, and go upon this principle, that a gift to A. for life, and from and after the decease of A., to B., C., D., or anybody else, means from and *after [712 the determination of the estate; and whether the estate is determined by revocation or by death, or by the incapacity of the devisee to take, or by any other circumstance, the life estate being out of the way, the remainder takes effect, having only been postponed in order that the life estate may be given to A. *Lainson* v. *Lainson* (2) was affirmed by those two eminent judges Lords Justices Knight Bruce

(1) 3d ed., vol. i, p. 538.

(2) 18 Beav., 1; 5 D. M. & G., 754.

and Turner, and affirmed upon the broadest principles. And therefore, without going further, it is sufficient to say that that case, based as it is upon the authorities from the earliest period downwards, decides the point which I have now to decide, that the life estate being out of the way, as it is here, by the incapacity of the tenant for life, the remainder takes effect as if there had been no life estate. Here the incapacity arises from the daughter being an attesting witness. If she had been a person absolutely incapable by law to take, the effect would have been the same. Upon those grounds, therefore, I am clearly of opinion that the remainder is accelerated, and the children take just as if the mother had died immediately after the testator.

It is said that this rule of construction does not apply with regard to the personal estate; but Lord Romilly has decided in *Eavestaff* v. *Austin* (1) that the same rule does prevail, and the remainder is accelerated. In that case, by a will so much property as would produce £100 a year was given to A. for life, with remainder to her children; and by a codicil the life estate of A. was revoked, and it was argued that there was no gift to the children until after the death of the tenant for life, and consequently the estate was undisposed of. Lord Romilly said there that the same rule prevailed, and the removal of the life interest by the codicil accelerated the remainder, and the children took as if the tenant for life had died.

There is another point which renders this doctrine as to the personalty very important. The rule clearly is, that where personal property is given to a person, or to a class of persons, at a future period, unless the interest is in the meanwhile otherwise disposed of, it is to be accumulated for the benefit of those who ultimately become entitled to the
713] capital. And therefore, if I had not held *that there had been acceleration with regard to the personalty, I should probably, upon an application to Chambers, be asked for maintenance during the minority.

I am, therefore, of opinion that the effect of the will is to accelerate the remainder, and that the children are entitled in possession to the real and personal estate. There may be some doubt whether this is not a contingent remainder. It is very like a case of *Festing* v. *Allen* (2) which I argued many years ago. This was a decision of the Court of Exchequer, which was afterwards affirmed by Sir James Wigram (3), that a gift to A. for life and to the children who should attain twenty-one, was a contingent remainder. And

(1) 19 Beav., 591. (2) 12 M. & W., 279. (3) 5 Hare, 573.

where the life estate had failed while the children were in their minority, they would fail to take the estate altogether. I consider that that case was properly overruled in a case which I argued before Vice-Chancellor Stuart, of *Browne* v. *Browne* (1). I believe it has been the subject of strife since. My opinion was always against *Festing* v. *Allen*, though it was the judgment of the Court of Exchequer delivered by a very eminent judge, Lord Cranworth.

Therefore, upon all these grounds, I say that the children are entitled to possession of the real and personal estate during the lifetime of the mother. It is to be equally divided between them, the division being postponed till they attain twenty-one.

Solicitors: *Torr, Janeway, Tagart & Janeway; Moncton, Long & Co.*

(1) 3 Sm. & Giff., 568.

As to when a legacy or devise to a subscribing witness is invalid: 14 Eng. Rep., 536 note; 15 Eng. Rep., 720 note; Brett *v.* Brett, 3 Addams' Ecc., 210.

The complaint alleged that one Rogers died, leaving a will by which he devised certain real estate to his son, J. Rogers, subject to an estate for life therein of his widow, and to the payment of certain legacies: that J. Rogers paid the legacies, bought the life estate, entered into possession of the land, and subsequently conveyed the same to the plaintiff, who is now in possession thereof; and that after the death of the widow, a sister of J. Rogers, one of the defendants herein, claimed that the devise to him was void, for the reason that he was one of the two subscribing witnesses to the will, and that she was entitled to an undivided one-sixth of the land. The plaintiff asked that his title be declared valid, and that if this were not done, that a partition and sale of the premises might be had. Held, that the action was one in equity, to establish the validity of a will of real estate conclusively as against all the heirs, and that the rule in such cases was that all the witnesses thereto must be called and examined, except in the event of death, insanity or absence, or unless the heir waived his right, and that the court below erred in this case in holding that it was sufficient to call and examine one witness only: Chapman *v.* Rogers, 12 Hun, 342.

[3 Chancery Division, 714.]

V.C.M., July 12, 26, 1876.

*Roper v. Roper. [714

[1873 R. 57.]

Dower, Satisfaction of—Annuity—Priority.

A widow is not entitled to priority over other legatees in respect of an annuity bequeathed to her by her husband, "in lieu, bar, and satisfaction of dower," where the only real estate of the testator was conveyed to him with a declaration against dower.

Where both annuities and legacies are charged upon real estate, although the annuitants have power of distress and entry, the annuities will not have priority over the legacies.

JOHN ROPER, by his will, dated in February, 1870, bequeathed various specific and pecuniary legacies. He then bequeathed to his wife, Emma Roper, an annuity of £200 during her life, and directed the same to be paid to her quarterly, and to be for her sole and separate use, and that she should not be allowed to have the value of the annuity in lieu thereof, and he declared that the said annuity should be accepted by his wife in lieu, bar, and satisfaction of dower. The testator then gave several other legacies, and he bequeathed to his daughter, Frances Foord, an annuity of £50 during her life, and to his daughter, Mary Ann Green, an annuity of £50 during her life, and to his daughter, Sarah Minter, an annuity of £52 during her life, and he directed the said three several annuities to be paid quarterly, and to be for the sole and separate use of the respective annuitants, without power to alienate or anticipate the same; and the testator declared that the annuities to his wife and to his three daughters should be chargeable upon and issuing out of all and singular the freehold hereditaments and real estate to which he should be entitled at the time of his decease (in addition to the residue of his personal estate), and he empowered his wife and his three daughters severally and respectively, by distress and entry upon and perception of the rents and profits of his said hereditaments and real estate so charged as aforesaid, to recover payment of the said several and respective annuities when in arrear for twenty-one days, and that all the annuitants should respectively have all the 715] powers for recovering *their annuities that landlords had for arrears of rent; and, subject to and charged with the payment of the several legacies and annuities, and any debts, funeral and testamentary expenses, the testator thereby gave, devised, and bequeathed all and singular his freehold hereditaments and real estate, and all and singular the residue of his personal estate, unto and equally between his son John Roper and his daughter Frances, in equal shares as tenants in common, and to their several respective heirs, executors, administrators, and assigns, absolutely.

The testator died in January, 1871, and was then seised and possessed of some personal estate and certain real estate, including certain freehold premises called Grove Mill. All the testator's real estate had been conveyed to him with declarations that his widow should not be entitled to dower, and he had no real estate which was liable to dower.

In April, 1873, the property called Grove Mill was advertised for sale by the trustees of the will, and it was alleged by them as a ground for the sale that the personal estate of

the testator was insufficient to pay the debts and funeral expenses, and they proposed to sell the said property in order to answer the legacies given by the will.

The bill was filed by the widow of the testator, alleging that the real estate, so far as it would extend, ought to be applied in payment of the annuities in priority to the legacies; that such real estate was insufficient to provide both for the annuities and the legacies; and that if the real property advertised for sale were sold, and the legacies paid out of the proceeds, the part of the real estate remaining unsold would be an insufficient security for the annuities.

The bill prayed that the real and personal estate might be administered by the court, and the trusts of the will declared and carried into effect, and that the trustees might be restrained from selling the real estate so advertised for sale.

The case came on upon further consideration.

Carson, for the plaintiff: The plaintiff is entitled to priority in respect of the annuity given to her in satisfaction of dower. According to the old law, *where a widow [716 was entitled to dower, and she accepted an annuity given to her in lieu of dower, the annuity was entitled to priority; but where she had no dower, the annuity had no priority. This law is preserved by sect. 12 of the Dower Act (3 & 4 Will. 4, c. 105); and in order that an annuity given in lieu of dower should have priority, it is still necessary that the widow should be entitled to dower. But the question arises whether to get priority she must be entitled to dower according to the old law or the new law. According to the facts of the present case, the plaintiff would be entitled to dower according to the old law, but she would not be entitled according to the new law, by reason of declarations against dower contained in the conveyances.

I submit that, according to the true construction of the section, it is sufficient to give her priority if she would have been entitled to dower according to the old law; otherwise the section is meaningless. No provision of the act could have interfered with the rule of equity giving priority to legacies bequeathed in satisfaction of dower, if this means dower according to the new law. The court could, without any assistance from this section, have given the priority in the few cases in which the widow is entitled to dower according to the new law. But the section must apply to some cases in which, but for the section, the provisions of the act would have interfered with the old rule. What were these cases? They must be those cases in which, ac-

cording to the old law, the widow would have been entitled to dower, and according to the new law she would not. If the old law were to be applied to such cases, a legacy in lieu of dower would have had priority; but if the new law were applicable, such a legacy would have no priority, and in this manner the provisions of the act would have interfered with the rule. It is with regard to these cases that sect. 12 provides that the provisions of the act shall not have this effect. In other words, the section says, as I contend, that as far as priority of legacies in lieu of dower is concerned, the old law of dower shall continue; and wherever according to the old law the widow would have had dower, then if a legacy be given to her it shall have priority.

Again, if it is argued that the plaintiff's annuity has no priority because she has no dower, and that she has no 717] dower because of *the declarations against dower in the conveyances (which declarations derive their sole efficacy from the previous provisions of the act), this virtually makes something contained in the act to interfere with a rule of equity which would according to the old law have given priority to the plaintiff's annuity. The rule as to the widow's priority is laid down in *Burridge* v. *Bradyl* (1), *Stahlschmidt* v. *Lett* (2), and *Heath* v. *Dendy* (3).

If, however, the court should be of opinion that the widow is not entitled to priority over the other annuities, she and those annuitants would still have priority over the legacies, because the annuities are all charged upon the real estate, and there is a power of distress and entry upon the estate given to the annuitants. On that ground, therefore, all the annuitants have priority over the legatees.

J. Pearson, Q.C., and *Dixon*, for the other legatees, cited *Acey* v. *Simpson* (4).

Stallard, for the trustees.

MALINS, V.C.: This testator having given an annuity to his wife, who, I understand, was his second wife, also gives annuities to his children who were children by a former wife, and he declares "that the said annuity to my wife is and shall be accepted by her in lieu and satisfaction of dower."

Now, the law, I take it, is perfectly well settled, that whenever a testator, having land of which his wife is dowable, gives her an annuity in satisfaction of her dower, she has priority, although the annuity may greatly exceed the amount of any dower she would be entitled to.

(1) 1 P. Wms., 127.
(2) 1 Sm. & Giff., 421.
(3) 1 Russ., 543.
(4) 5 Beav., 35.

If, therefore, the testator were to give an annuity of £500, and declare that to be in satisfaction of dower, the widow would be entitled to priority for the whole amount of the annuity of £500 a year, although it might be ascertained that the dower would have given her £100 a year only. In this case the testator *declared that the annuity [718 should be in bar of dower. But it turns out that he never had at any period of his life any land whatsoever out of which she was dowable. Because, although he acquired land by purchase, in every instance the conveyance made to him contained a declaration that no wife who survived him should be entitled to dower, and that declaration, by virtue of the 6th section of the Dower Act, is just as effectual to bar the dower as the old conveyance to uses to bar dower. He, therefore, never had at any time of his life any land out of which his wife was dowable.

Now, it was decided by Lord Langdale in the year 1842, in the case of *Acey* v. *Simpson* (1), that a legacy to a widow in lieu of dower has no priority over other legacies where the testator leaves no real estate. In that case the testator gave his widow a legacy of £50 and an annuity of £100 for life, and he declared that the legacy should be paid without any deduction, and should be accepted and taken by his wife in lieu and satisfaction of and for all dower or thirds at common law or by custom which she might otherwise claim from or upon all or any of his real estate. There was a deficiency of assets to pay all the legacies, and the question was whether the usual rule was to prevail, that the widow's annuity should take priority over the other legacies. It appeared that there were no real estates out of which the widow was dowable. That is exactly the case here. It was there argued for the plaintiff that the widow was not a purchaser as there was no real estate, and that she ought to come in *pari passu* with the other legatees. The counsel for the widow admitted that they could not successfully maintain the contrary, and the Master of the Rolls decreed accordingly.

Now that is after the Dower Act, because the Dower Act was passed in 1833, and this was a decision in 1842. In that case the testator had no real estate, and in this case the testator had no real estate out of which his widow was dowable. It appears to me, therefore, that the result is precisely the same.

Mr. Carson pressed me very much upon the question whether the widow was entitled to dower under the old law

(1) 5 Beav., 35.

or under the new law. Now the new law has very much 719] deprived the widow of *the right to dower, but it has also conferred upon her advantages that she had not before. It has given her dower out of equitable estates. Before this act passed the widow was only dowable out of legal estates. That is, therefore, a privilege given to the widow. The act enacts in the 6th section "That a widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land." The 7th section is this: "A widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, when by the will of her husband duly executed for the devise of freehold estates he shall declare his intention that she shall not be entitled to dower out of such land or out of any of his lands." Therefore it seems to me the fair construction of that section is, that when the will itself bars the widow of her right to dower, then comes in the 12th section, which says, "Nothing in this act contained shall interfere with any rule of equity or of any ecclesiastical court by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies." It may apply to the 7th section only, or it may apply generally. I am of opinion it applies generally. It is merely a provision introduced for the protection of the widow. Therefore, when the husband gives an annuity in satisfaction of dower, her right will be just the same as to priority over legacies as if this act had not passed.

But then comes the question, is the wife entitled to priority in consequence of that declaration that the annuity shall be in lieu of dower? The law, I think, is reasonably settled by the case of *Acey* v. *Simpson* (1), that if the husband has never had any land out of which the widow is dowable, then it is an empty declaration; and if he has land out of which the widow was not dowable, it is equally an empty declaration, because there is nothing of which she was a purchaser. Consequently she stands *pari passu*, in my opinion, with all the other legatees and annuitants. My own individual opinion would be, except where annuities are given to children who have equal claims with the widow, that the widow, as between herself and strangers, ought to 720] have priority; but *unfortunately the law is not so. I am glad to find, however, in this case, that the conclusion I arrive at is one which does perfect justice, because the

(1) 5 Beav., 35.

other annuities are given by the will to the children of the testator by the first wife. They are all, therefore, in my opinion, equally meritorious claimants. I am very glad to find that it does complete justice.

On these grounds, I am of opinion that, inasmuch as there was no land out of which the widow was dowable, the result is just the same as if the testator had no land whatever, and the case is governed by that of *Acey* v. *Simpson* (1).

Another point has been urged, which is, that the widow and all the annuitants have priority over the general legatees, because there was a right of distress and entry. Now I need not observe that when a man gives an annuity chargeable upon his land, although nothing is said about distress and entry, that would be incidental to the gift. That was the decision in *Buttery* v. *Robinson* (2), followed by myself in *Sollory* v. *Leaver* (3). Therefore, without those words being used, the wife would have a right of distress and entry. But all that is set at rest, because he concludes by saying, "and subject to and charged with the payment of the several legacies and annuities, and my debts, funeral and testamentary expenses, I hereby give, devise, and bequeath all and singular my freehold hereditaments and real estate, and all and singular the residue of my personal estate, unto and equally between my son J. Roper and my daughter Frances in equal shares as tenants in common, and to their several respective heirs, executors, administrators, and assigns, absolutely."

Therefore, my opinion is, that the real estate is charged with all the annuities and all the legacies. That being so, the annuities will have to be valued according to the ordinary rule. They will be valued at the time of the testator's death, and be treated as legacies of an amount in value equal to the annuities; and then the widow, and all the annuitants, and all the legatees, will take ratably, according to the amount of their legacies. That, I believe, will do complete justice. The mode of doing it is very simple: you must convert everything the testator had into money; you must *ascertain the amount of the legacies, and now [721 that they are all legacies you must drop the word "annuity" and treat them all as legacies; you must pay the debts, funeral and testamentary expenses, and what remains will be divided amongst the legatees in proportion to the amount of their legacies.

[*J. Pearson*, Q.C.: In regard to the annuity to the widow,

(1) 5 Beav., 35. (2) 3 Bing., 392. (3) Law Rep., 9 Eq., 22.

it is directed by the testator that she is not to have the value of her annuity.]

I laid down the rule on that subject in the recent case of *Hatton* v. *May* (1), that where there is merely a declaration that the widow shall not have the value of her annuity, that goes for nothing; but in order to prevent her having the value there must be a gift over. I held in that case that the widow was not entitled to have the value of the annuity, because there was a gift over, and I directed that an annuity should be purchased for the widow, and retained by the trustees, and paid to her during her life.

Solicitors: *Duncan, Murton, Warren & Gardner*, agents for Walter Furley, Canterbury; *Kingsford & Dorman.*

(1) *Ante*, p. 148.

See note to Rogers *v.* Jones, *ante*, p. 756, 758 note.

[3 Chancery Division, 738.]

V.C.B., June 16, 1876.

738] *HUBBARD v. ALEXANDER.

[1870 H. 177.]

Will in Duplicate—Legacy repeated—Evidence.

At the death of a testator two copies of his will were produced, one of which had been retained by himself, the other deposited with his bankers; each with a codicil containing the same gift in the same words, but of different dates, and attested by different witnesses. Probate having been granted of the duplicate will and of the two codicils:

Held, that evidence by one of the attesting witnesses to one of the codicils was admissible for the purpose of showing, from the circumstances attending the execution, that the two codicils were not two but one instrument, and accordingly that the legatee therein named was entitled to one legacy only.

FURTHER consideration. John R. Alexander, the testator, whose estate was being administered in this suit, executed a will in duplicate, dated the 11th of December, 1863, and retained one copy in his own possession, the other being deposited with Messrs. Mackrell, his agents and bankers in London.

In 1865 the testator obtained from Messrs. Mackrell the copy of the will which had been deposited with them, and added thereto a codicil, giving "unto my brother-in-law, H. S. B. Bruce, the sum of £2,000, the same to be paid after the decease of myself and my said wife to the said H. S. B. Bruce, or to such person or persons as he may by deed appoint."

The execution of this codicil was dated the 8th of Novem-

ber, 1865, and it was attested by Robert Wynne, solicitor, of Mallow, county Cork, and John Denny, his clerk. The will and codicil were returned by the testator to Mackrell & Co.

*On the death of the testator in January, 1869, a [739 codicil in precisely the same words and figures as that attached to Messrs. Mackrell's copy of the will was found attached to the copy which had remained in the testator's possession, except that it bore date the 11th of September, 1867, instead of the 8th of November, 1865, and was attested by different witnesses.

Probate of the two wills described as duplicates and of the two codicils had been granted by the Court of Probate.

Evidence was tendered for the purpose of explaining the execution of the codicil to the will which had been retained by the testator in his own possession. Mr. Kendal, a solicitor, and one of the attesting witnesses to this codicil, deposed that on the 11th of September, 1867, he and the testator were fishing in the west of Ireland. On that occasion the testator asked him to attest a codicil to his will, which he then produced: "and I consented to do so. I did not act professionally on his behalf. I did not read the codicil, but he certainly did mention that it was a duplicate of one he had executed in England, and that he wished to attach the same codicil to his own duplicate copy of the will. The date of execution was inserted by me, or under my direction. I am positive that Captain Alexander (the testator) intended the codicil to be merely a duplicate copy of the one he had previously executed."

Eddis, Q.C., and *Pemberton*, for the plaintiffs, tendered this evidence, and contended that the Mr. Bruce, the legatee named in the duplicate codicils, was entitled to one legacy of £2,000 and no more.

Prima facie, two legacies given to the same person by distinct testamentary instruments are cumulative: *Wilson* v. *O'Leary* (1); but that presumption may be rebutted by circumstances: *Russell* v. *Dickson* (2); and evidence is admissible to enable the court to place itself in the position of the testator, and for the purpose, in this case, of showing that the second codicil was executed as a mere duplicate of the former codicil, and formed but one instrument, and accordingly, that the two gifts were not cumulative, but *mere repetition: *Whyte* v. *Whyte* (3); *Martin* v. [740 *Drinkwater* (4); *Guy* v. *Sharp* (5).

(1) Law Rep., 7 Ch., 448.
(2) 4 H. L. C., 293, 304.
(3) Law Rep., 17 Eq., 50.
(4) 2 Beav., 215.
(5) 1 My. & K., 589.

Phear, for the legatee: Evidence is only admissible for the purpose of ascertaining the knowledge possessed by a testator at the time when he made his will, e.g., where the description of the legatee, or of the thing bequeathed, is applicable equally to two persons or to two things, but not communications which have passed between the testator and a solicitor written by way of advice or statement, or anything else: *Bernasconi* v. *Atkinson* (1); *Wilson* v. *O'Leary* (2).

In this case, there being two codicils of different dates, attested by different witnesses, to both of which probate has been granted, the *prima facie* rule that they are distinct instruments, and that the gifts are cumulative, so as to entitle the legatee to both, must prevail, especially where, as in this, there is no inconsistency and nothing to show that they could not coexist, except as mere duplicates: *Whyte* v. *Whyte*; *Wilson* v. *O'Leary*.

Sir *H. Jackson*, Q.C., *Macnaghten*, and *Grenside*, for other persons interested under the will; and *Rigby*, for the Crown, also appeared in the case.

Bacon, V.C.: Both rules are very distinctly laid down in the authorities, and have become the law of the court, and the authorities adverted to are merely illustrations of the application of those rules. Speaking generally, if a legacy is given by one instrument, and another legacy is given by another instrument, that would be a cumulative legacy. What I am asked in this case to consider is whether there is any different instrument, because, unless I am satisfied of that, there is no reason for the application of the rule. Consider what the facts are, and which I must attend to, and which are clearly in evidence. The testator 741] makes his will in *duplicate, and leaves one copy with his banker, and retains the other copy in his own possession. It occurs to him that he will leave a legacy to the present claimant, and accordingly he sends for his will from the banker. He makes a codicil to it, and in that codicil he gives this legacy of £2,000. He sends the will back, and keeps the other duplicate copy of the same will.

I admit the evidence of Mr. Kendal for the purpose of showing that these codicils were not two distinct instruments, but not for the purpose of construing them. The codicil "to my foregoing will" was attested by Mr. Kendal. It was attached to the copy of the will retained by the testator in his own possession, and it is proved to have been his intention to execute a duplicate of that which he had

(1) 10 Hare, 345, 348. (2) Law Rep., 7 Ch., 448.

made before. He has done it effectually, and in my opinion it is not a different or a separate or distinct instrument. There is one legacy of £2,000, and no more, and that, I take it, is consistent with all the authorities which have been referred to. It must be declared that the defendant Bruce is entitled only to a single legacy of £2,000.

A further question arose upon a gift of one-third of the residue of the testator's estate "unto the trustees of the Royal Benevolent Society."

It appeared that at the date of the will a society called the Royal Benevolent Society was in existence, but that in 1866 the society changed its name to that of the "Universal Beneficent Society." The gift of one-third of the residuary estate was claimed by this society.

BACON, V.C., held that the Universal Beneficent Society, under which title the Royal Benevolent Society continued to exist, was entitled to the legacy given by the will to that society under the name by which it was then known.

Solicitors: *Meynell & Pemberton; T. Graham.*

[3 Chancery Division, 743.]

V.C.B., July 22, 27, 1876.

*DONALDSON V. DONALDSON. [743

[1852 D. 91.]

Settlement by Will of Real Estate—Subsequent Settlement by Deed of Personal Estate on Corresponding Trusts—Personal Estate directed to be laid out in Purchase of Land to be held as Money—Rebuilding of Mansion house allowed out of Accumulations for Twenty Years of Part of the Personal Estate.

Testator devised real estates in strict settlement, and directed his residuary personalty to be laid out in the purchase of lands to be settled to the same uses. After the date of the will, the testator executed a deed whereby he assigned specific personalty to a large amount to the same persons whom he named as the trustees and executors of his will, upon trusts (not referring to, but) corresponding with, and only in a remote contingency differing from, those of the will.

The mansion house having been pulled down, and requiring to be rebuilt, the tenant for life proposed that, out of the specific personalty fund settled by the deed, £24,000 should be advanced to him to pay for the rebuilding, and that out of the same fund a sum of £40,000 should be set aside, and the dividends accumulated for twenty years, until an amount of £24,000 should be saved, with which the same fund should be recouped:

Held, that the court had jurisdiction to make the order.

PETITION. Thomas Hudson, by his will, dated the 29th of June, 1850, bequeathed certain specific chattels which should be in and about his mansion house of Cheswardine Hall, Salop, to trustees (whom he also appointed executors) upon trust for his wife (who died in his lifetime) for life;

and after her death he directed the same to be sold, and that the produce of such sale should belong to his residuary personal estate. He bequeathed all his residuary personal estate, after payment of debts, funeral and testamentary expenses and legacies, to the same trustees upon trust to convert and stand possessed of the same upon the trusts thereinafter declared. He devised all his real estate to the use of the same trustees and their heirs; and declared that his trustees should stand possessed of his said real estate and of his residuary personal estate upon trust to accumulate the rents, profits, and income thereof which should arise before the 1st of November, 1861, in augmentation of his personal estate. He directed his trustees from time to time, as occasion should require, to lay out and invest "all" his 744] said *residuary personal estate, and the funds produced by the accumulation thereinbefore directed, in the purchase of hereditaments in England or Wales, to be conveyed to his trustees, and to be subject to the same trusts as if the same had been part of his general real estate. He directed his trustees as soon as conveniently might be after the 1st of November, 1861, to cause all his real estate thereby devised, or which should be purchased under the trusts of his will, to be settled to the use of Charles Donaldson Hudson during his life without impeachment of waste, with remainder to the use of his first and other sons successively in tail male, remainder to the use of Thomas Donaldson for life, remainder to the use of the first and other sons of Thomas Donaldson successively in tail male, with divers remainders over, and an ultimate remainder to the use of the testator's right heirs.

By a settlement dated the 12th of April, 1852, and made between the above named testator, Thomas Hudson, of the one part, and the three persons who were in the will and a codicil thereto named as the trustees thereof, of the other part, such parts of certain bonds, debentures, moneys, stocks, funds, and securities, mentioned or comprised in the schedule, as were not then effectually vested in the trustees, were assigned by Thomas Hudson to the same three persons upon trust as the said Thomas Hudson should by deed appoint, and in default of appointment upon trust to continue the investments, or sell and convert the same, and invest the proceeds as therein mentioned, and pay the income to Thomas Hudson for life; and after his death to raise certain annuities and other sums, and after his decease during the (then) minority of the said C. D. Hudson, to pay such portion of the income as they should think proper for the

maintenance and education of C. D. Hudson, and when C. D. Hudson should have attained twenty-one, and thenceforth until he should attain thirty, should accumulate the unapplied portion of the income in manner therein mentioned, and stand possessed of the accumulations and income upon the trusts thereinafter declared of the residue of the trust premises, and the income thereof; and upon further trust, when and so soon as C. D. Hudson should have attained thirty, to pay the income of the trust premises to C. D. Hudson for life, and after his decease stand possessed of the trust premises and the income *thereof, upon [745 trust for such son of C. D. Hudson as should first attain twenty-one, absolutely; and in case there should be no son of C. D. Hudson who should live to attain twenty-one, then upon like trusts for the benefit of Thomas Donaldson for life, and after his decease for such son of Thomas Donaldson as should first attain twenty-one; and if there should be no son of C. D. Hudson or T. Donaldson who should attain twenty-one, then upon certain other trusts in succession; and an ultimate trust for the persons who would upon the death of Thomas Hudson be entitled to his personal estate under the Statutes of Distribution in case he had died intestate. By the same deed the trustees were empowered to sell or dispose of any part of the stocks, funds, or securities for the time being subject to the trusts of the indenture, and lay out and invest the moneys in the purchase of real estate, to be conveyed to the trustees upon trust to sell, and to stand possessed of the proceeds of sale, and of the rents and profits thereof until sale, as if the same were money.

On the 14th of April, 1852, Thomas Hudson died.

On the 1st of August, 1854, a decree was made in the suit, which was instituted by Charles Donaldson Hudson, then a minor, against Thomas Donaldson and the other persons interested in remainder, and the trustees, declaring that the trusts of the will and indenture ought to be carried into execution, and directing accounts and inquiries.

The defendant Thomas Donaldson died on the 13th of July, 1867, leaving an eldest son, Walter Kirwan Donaldson, now of the age of about twelve, and other sons.

On the 11th of February, 1870, the plaintiff attained the age of thirty.

The property subject to the trusts of the will consisted of the site of the mansion house of Cheswardine Hall, which since the testator's death had been pulled down, and real estates adjoining, and of other property producing together

an income of about £3,106 10*s.*; and the property subject to the trusts of the indenture consisted of particulars producing an income of about £17,463; the total income being now about £20,569 10*s.*

The plaintiff was tenant for life of both properties. He had one son, Ralph Charles Donaldson Hudson, born on 746] the 20th of *February, 1874, who was first tenant in tail in remainder, and two daughters.

The present petition was presented by the plaintiff, stating the above facts, and that the trusts of the will and settlement were "substantially" the same; also that the mansion house at Cheswardine Hall had been proved to be small and inconvenient, and built upon insufficient foundations, and with defective materials; and that the petitioner had been advised that it would be more prudent and less expensive in the end to pull down the existing house, sell the materials, and build a new one; that the petitioner accordingly had caused the mansion to be pulled down and the materials to be sold, which had been done; that he had entered into a contract for the rebuilding of the mansion for a sum of £26,363; and that it was expected that certain contingent expenses would bring the total cost up to £30,000 or £31,000.

He then stated as follows:—

"Your petitioner is willing and desirous that the whole expense of rebuilding the said mansion house should be provided for out of the income of the trust estate, and he is willing to bear a substantial part of the expense himself without any assistance from the court; but he is desirous and humbly submits that it will be right and proper and for the benefit of all parties interested in the said trust-estate that some part of the expense should, as in the case of other permanent improvements, be spread over a period of years, and charged on the income of the trust estate.

"Your petitioner submits that such a course would not only be beneficial to himself personally . . . but would also benefit the parties entitled in remainder by insuring the completion of the said mansion house; as in the event of the death of your petitioner before such completion, there would be no fund available for the purpose of such completion."

The petitioner accordingly proposed that the contract might be approved, he undertaking to provide for all sums which might be required for completing the house over and above £24,000; that for the purpose of providing £24,000 a sum of £40,000 stock, part of a sum of £226,481 4*s.* 6*d.*

stock, being part of the property which was subject to the trusts of the indenture, should be carried *to a sepa- [747
rate account to be intituled "The Cheswardine Mansion House Accumulation Account," and the dividends accumulated for twenty years until the sum of £24,000 should have been made up; that in the meantime the sum of £24,000 should be advanced to the petitioner out of the residue of the said sum of £226,481 4*s.* 6*d.* stock by four instalments of £6,000, on satisfactory proof of the payment by the petitioner, in accordance with the contract, of sums equivalent to such instalments; and that on the repayment to the indenture settlement account of the £24,000, the £40,000 stock should be retransferred to the same account.

The petition stated that in the event of the petitioner, who was now thirty-six years of age, living for twenty years, the whole burden of repaying the principal would fall on him, who was willing to assume such burden; and that in the event of his dying before the expiration of twenty years, the instalments would be nearly all paid up during the minority of his son Ralph C. D. Hudson, now only two years old, or in the event of his (the infant's) death under twenty-one, of any other son of the petitioner who might take his place; and the first tenant in tail in possession would obtain the full benefit of the rebuilding of the mansion house, subject to the payment of the instalments, if any, remaining unpaid on his coming into possession.

The petitioner prayed for an order in the terms of the above proposal.

Kay, Q.C., and *Reginald J. Cust*, for the petitioner: That which the petitioner asks is less than what was done by the Lords Justices in *Drake* v. *Trefusis* (1).

Bacon, V.C.: If the petitioner lives for twenty years, he will at the end of that time have made a very handsome present to the estate. If he does not live, may not the case be met by insuring his life?

Kay: If he insures his life against the twenty years, he will have to pay the premiums. We do not know what this amount will be.

The acts commonly called the Mansion House Acts (27 & 28 Vict. c. 118; 33 & 34 Vict. c. 56) were referred to.

**H. Cadman Jones*, for the eldest son of the peti- [748
tioner, one of the trustees, and most of the ulterior takers: I do not oppose the application. In all probability the arrangement will be greatly for the benefit of the infant.

But I am bound to point out that in *Drake* v. *Trefusis* (1)

(1) Law Rep., 10 Ch., 364.

the trust was to lay out money in the purchase of lands to be settled to the like uses; hence the land and the money must have gone together; here there are two settlements, one of real estate, the other of personalty, and events may happen in which the realty will go one way and the personalty another.

Macnaghten, for other respondents.

BACON, V.C.: If the tenant in tail in remainder were adult, there would be no difficulty. All I am asked to say is, whether in my opinion the arrangement will be for the benefit of this infant; and I have no hesitation in saying it will be for his benefit.

Upon the other point I think the court has jurisdiction. The £40,000 is not abstracted from the fund, it is only temporarily removed in order to be replaced again. Building a mansion house is not an "improvement" in the technical sense of the word; it is, in fact, an augmentation of the estate. There is a difference between this case and that of *Drake* v. *Trefusis*; but it is not such a difference as affects the question of jurisdiction.

There will be an order as prayed, unless a better mode of effecting the object, by way of insurance of the petitioner's life, can be devised.

July 27. The case was again mentioned; and it was stated that on inquiry no satisfactory mode of carrying out the arrangement by insurance could be effected; whereupon

The VICE-CHANCELLOR made the order as prayed.

Solicitors: *Bowker, Peake & Bird; Bennett, Dawson & Bennett.*

[3 Chancery Division, 749.]

V.C.B., July 27, 1876.

749] *HALL v. OLD TALARGOCH LEAD MINING COMPANY.

[1876 H. 185.]

Voluntary Winding-up—Action by Shareholder.

After resolutions had been passed and confirmed for the voluntary winding-up of a company, a shareholder, in ignorance thereof, commenced an action against the company and the directors to have his name removed from the register, for a rescission of his contract to take shares, on the ground of misrepresentations in the prospectus, and to obtain repayment of all moneys already paid, and an indemnity against future liability in respect of his shares:

Held, that the relief asked in the action was not inconsistent with the winding-up; and a motion by the voluntary liquidator to stay all further proceedings in the action was refused with costs.

MOTION on behalf of the defendant company and the liquidator thereof under the voluntary winding-up, that all further proceedings against the defendant company in this action might be restrained, either absolutely or until further order, as the court should think fit.

In September, 1874, the plaintiff applied for, and in December an allotment was made to him, of fifty shares, on which he had paid £250. By the statement of claim delivered in his action, plaintiff alleged that the prospectus, on the faith of which he applied for shares, contained material misrepresentations. He also alleged that about the end of February and the beginning of March, 1876, he discovered the misrepresentations, and immediately repudiated the position of a shareholder, and applied to the defendants, the directors, for a rescission of the contract, removal of his name from the register, and repayment of the £250 paid by him on allotment, and that the directors, in reply, asserted that the statements in the prospectus were true, and thereby delayed the plaintiff in obtaining relief. On the 25th of February, 1876, resolutions were passed, and on the 15th of March confirmed, for a voluntary winding-up of the company.

On the 3d of May, 1876, in ignorance (as he alleged) of these resolutions, the plaintiff commenced this action against the company and the directors, claiming by his writ a declaration that he ought to be relieved from his position as a shareholder in the defendant *company, the rescis- [750
sion of the contract for the issue and acceptance of shares, the removal of his name from the register, and that the directors might be ordered to recoup to him all sums paid by him on account of the shares allotted to him in the company, and to indemnify him against all liability in respect of the said shares.

The liquidator, in his affidavit in support of the present motion, stated that the company was wholly insolvent, and that there were not sufficient assets for payment of the creditors.

Sir *H. Jackson*, Q.C., and *Russell Roberts*, in support of the motion: This action, which can only result in useless costs being incurred, as the company is insolvent and any claim by the plaintiff to repayment is subject to the rights of creditors, ought not to be allowed to proceed. By the Companies Act, 1862, s. 87, upon the order being made for a compulsory winding-up, all proceedings against the company without leave of the court are stayed. The fact that the winding-up is voluntary does not give the plaintiff any

better right; the object of sect. 138, which enables the liquidators or the contributories in a voluntary winding-up to apply to the court for a determination of any question, and for the exercise of all powers in the same way as if the company were being wound up by the court, being to abolish any distinction between the jurisdiction of the court in a voluntary and in a compulsory winding-up: Buckley on the Companies Act (1). If this application had been made in Chambers under sect. 87, the action would not have been allowed to proceed. The question of the liability of the plaintiff, who was *de facto* a shareholder at the date of the winding up, as a contributory (*Oakes* v. *Turquand* (2) can be determined in the voluntary winding-up; and the claim for repayment being, from the state of the assets, hopeless, the action in its present form can have no other result than the incurring of costs. If allowed to proceed, the claim ought to be amended under Rules of Court, 1875, Order XVII, rr. 8, 9, by striking out the name of the company, so as to relieve the assets from costs of useless litigation, and making one of the directors a defendant.

751] **Kay*, Q.C., and *W. Phipson Beale*, for the plaintiff: The plaintiff is entitled not only to have his name removed from the register of shareholders, but also, as against the directors, to repayment of his £250, notwithstanding the winding-up: *Henderson* v. *Lacon* (3). Order XVII, rules 8, 9, has nothing to do with the matter, being applicable to cases where, under the old practice, a bill might have been demurred to as multifarious, and these rules cannot have the effect of rendering improper and irregular, and therefore staying, a suit which would have been proper and regular before the passing of the Judicature Act: *Henderson* v. *Lacon*. It is not pretended that the action is not regularly and properly constituted, but it is said that it must be stayed, because in the opinion of the liquidator there will not be assets sufficient to answer the claim of the plaintiff if established. As to the voluntary winding-up, the fact that other relief is sought in addition to a removal of the plaintiff's name from the register would be sufficient to prevent the stay of proceedings, even if the winding-up were compulsory or under supervision.

Sir *H. Jackson*, in reply.

BACON, V.C.: I do not think I ought to interfere with this action, in which the plaintiff does not ask more than he is entitled to require on the authority of *Henderson* v. *Lacon*. No relief is asked against the company beyond what

(1) Page 273. (2) Law Rep., 2 H. L., 325. (3) Law Rep., 5 Eq., 249.

the law allows, or which is inconsistent with the Winding-up Acts. The action is not against the company alone, but against the company and other persons; and this prevents me from dealing with it as I otherwise might. If the objection to the action had been raised in Chambers, I could not have dealt with the matter until the cause came on to be heard, as the question of the plaintiff's right to repayment is inseparably connected with his case and the relief to which he claims to be entitled; and, as far as he knows, he can never obtain any substantial relief against the company in Chambers under the voluntary winding-up. The liquidator, it is true, might have a right to say, I told you at the commencement of the proceedings that unless costs were being incurred; and if after this intimation the *plain- [752
tiff chose to proceed, his doing so might have an important bearing on the question of the costs of the action. But I do not think that I ought to accede to this application, and I see no reason why the action should not be carried on in the way in which it has been framed. The motion is misconceived, and as an experiment it must be refused with costs.

Solicitors: *Kennedy, Hughes & Kennedy; Sharp & Ullithorne*, agents for Simpson & Hockin, Manchester.

[3 Chancery Division, 752.]

V.C.B., Aug. 2, 1876.

Bevan v. Waterhouse.

[1876 B. 262.]

Administration—Shares in a Company belonging to Testator at his Death—Shares allotted to and accepted by Testator's Trustees after his Death—Calls, whether payable out of Income or out of Capital.

Testator bequeathed residuary personalty to trustees, with permission to continue existing investments, upon trust to convert, and invest in, amongst other securities, the stock or shares of any company in Great Britain, and pay the income to a tenant for life, with remainder over. He declared that "the calls, if any, which at or after my decease may be or become due in respect of any shares for the time being constituting part of my residuary personal estate, shall be paid by" the trustees out of income, and not out of capital.

Testator at his death held waterworks and railway shares, upon which some instalments were due, but not yet payable.

After the testator's death the trustees sold some shares on which a call was actually payable, and allowed the brokers to retain the amount of the call out of the sale moneys, for the benefit of the purchaser.

After the testator's death the trustees accepted allotments of valuable shares offered to them in respect of their proprietorship in the company:

Held, that the instalments due on shares accepted by the testator in his lifetime, when payable, and the amount of the call moneys deducted on the occasion of the sale, were calls within the meaning of the will, and hence payable out of income.

Held, further, that the shares accepted by the trustees did not constitute part of the testator's residuary personal estate at his death, and hence that the calls on such shares were payable out of capital.

SPECIAL CASE. Paul Bevan, who died on the 12th of June, 1868, by his will, dated the 2d of February, 1866, be-
753] queathed his residuary personal *estate to trustees, whom he also appointed executors, upon trust either to permit so much of the said residuary personal estate as should at his decease be standing in or upon any investment or security whatsoever to continue in or upon such investment or security for any period which the trustees should think proper, or from time to time to sell, call in, and convert into money the said residuary personal estate; and after payment of debts, funeral and testamentary expenses and legacies, to invest the residue of the said moneys in their names in any of the parliamentary stocks or public funds of Great Britain, or at interest on government or real securities in England, Wales, or India, or in or upon the stock of the Bank of England, or the stocks or shares or the bonds or debentures of any canal, railway, dock, or other public company in Great Britain or India, with power to vary securities. He declared that the residuary trust moneys should be divided into three equal shares, and that the trustees should stand possessed of the three shares, upon trust as to one for the benefit of his daughter Mary Waterhouse for life, and afterwards of her children; as to a second, for the benefit of his son William for life, and afterwards of his children; and as to the third, for the benefit of his son Samuel for life, and afterwards of his children.

Testator declared as follows: "the calls (if any) which at or after my decease may be or become due in respect of any shares for the time being constituting part of my residuary personal estate in any railway or other public company, shall be paid by the said trustees or trustee for the time being out of the annual produce, and not out of the capital of my general residuary estate."

The testator had shortly before his death accepted an allotment of forty-six shares of £25 each in the East London Waterworks Company, which were offered to him in respect of stock in the company belonging to him. By a resolution of the proprietors it was provided that the £25 should be paid by five instalments, or calls, of £5 each, at intervals of six months; and that the proprietor might be at liberty on any day of payment to pay the whole or any of the instalments or calls in advance. All these calls were paid by the executors.

The testator had also in his lifetime accepted an allotment of *ten shares of £12 10*s.* each in the Maryport and [754 Carlisle Railway Company, which were offered to him as a proprietor of shares in the company. The amounts of these shares were by resolution of the proprietors made payable by four calls or instalments on the 1st of November, 1865; the 1st of October, 1866; the 1st of October, 1867; and the 1st of October, 1868. Thus the last of the four instalments was due at the testator's death, but was not then payable. When it became payable it was paid by the executors.

In 1871, ninety new shares of £3 each in the Maryport and Carlisle Railway Company were allotted to and accepted by the executors in respect of their holding in the company; and in 1873 a further allotment of twenty-seven shares of £10 cash in the same company was made to and accepted by the executors, who paid all the calls.

All the above shares in the last named company participated in the dividends declared on the ordinary stock and share capital of the company; and if they had been sold at their market value would have realized a premium.

On about the 12th of December, 1872, the executors sold eighty-five new shares of £10 each in the Monmouthshire Railway and Canal Company, at a premium of £1 5*s.* per share. At the time of the sale £5 per share had been paid, and a third call of £2 10*s.* was then due and payable. The shares were accordingly sold as having £7 10*s.* paid up, and the £2 10*s.* per share then due from the executors and not paid by them was allowed by the executors to be retained by the broker.

In 1874 an allotment of forty shares of £12 each in the same Monmouthshire Railway and Canal Company was made to and accepted by the executors, and the executors had paid the two first calls.

The plaintiffs, the trustees and executors of the will, contended that all the above payments by executors, including the amount deducted from the purchase-money of the shares sold as above mentioned, should be made out of, and be charged to the capital of the testator's estate; the defendants, the children of Mrs. Waterhouse, and of William and Samuel Bevan, contended that they should be made out of, and be charged to, income.

*The questions were: 1. Whether, according to [755 the true construction of the will, the calls paid by the executors after the testator's death on shares allotted to the testator in his lifetime, were payable out of the capital or out of the income of the testator's estate; and 2. Whether,

according to the true construction of the will, the calls paid or to become payable upon the shares allotted to the executors, or upon any and which of them, were payable out of capital or income.

Tremlett, (*Kay*, Q.C., with him), for the plaintiffs: With respect to the first class of shares, those which were allotted to the testator in his lifetime, the whole amount became due immediately on allotment. The payment by instalments was only matter of convenience. Deferred payments are not "calls" in the strict sense of the word, hence not "calls" within the meaning of the testator's direction. They are in the nature of a present debt, payable in future. Hence, like other debts, they are payable out of capital.

BACON, V.C.: Was it certain that the company would require all this capital? They might never have called it up. At any rate, the taking of these shares was an investment, which might have been made by a present payment. Having, however, been made payable by instalments, in my opinion those instalments are clearly enough within the direction of the testator's will. They were "calls" and nothing else. But on the other class of shares, I will hear what the other side has to say.

Cozens-Hardy, (Sir *H. Jackson*, Q.C., with him), for the defendants: It is understood that your Lordship's decision covers the calls paid on the shares which were taken by the testator himself, and the call-moneys which were payable, but had not been paid, by the executors on the occasion of the sale.

Must not the decision extend to the shares which were taken by the executors? The words are "any shares for the time being constituting part of my residuary personal 756] estate." Is it not the *plain, natural, and almost necessary construction, that calls on shares allotted to and taken by executors, fall within this description? Must not the tenant for life take his life estate subject to the payment for this property? Actually the shares do at this moment constitute part of the residuary personal estate.

Gregory, for infants in the same interest: The right to take these shares was a valuable property. It was not an *onus*. The allotment letter was of considerable value. Was not the value of this letter part of the residuary personal estate? If so, were not the calls which afterwards became due payable out of the estate?

BACON, V.C.: In my opinion the two things are totally different.

The testator has directed that the calls which, after his

decease, may be or become due "in respect of any shares for the time being constituting part of my residuary personal estate," shall be paid out of income, and not out of capital.

What he means by that is, "my residuary personal estate at my death." He means to say, "If when my residuary personal estate comes to be realized, it is found that I have not paid all the calls that may be then due, then whenever they may be called for, they shall be paid out of income."

He says nothing whatever about subsequent acquisitions. Then the executors find an opportunity of investing in the purchase of these shares. It is optional with them whether they will accept the offer of allotment or not. They might have said, "We will have nothing to do with your new issue." But they exercise an option, and they choose to take them. That is a totally new transaction, to which the words of the will have, in my opinion, no application. Though by resting on the words of the clause you may derive that meaning from it, though that may be the literal construction of the words, I think what the testator means is, "The debt which I have contracted shall be paid out of income; I direct the executors so to pay it; whether they pay the money down, or distribute it over a number of years, it is part of *the purchase-money for the es- [757 tate which has been bought for the enjoyment of the tenant for life."

The rule which applies to one case does not, in my opinion, apply to the other.

Hence the answers to the questions will be that the calls on the shares which belonged to the testator at his death, including the call which was deducted from the sale moneys of the Monmouthshire Railway and Canal shares, are payable out of income; and that the calls on shares and stock which were accepted by the trustees and executors are payable out of capital.

The costs of all parties will come out of the estate.

Solicitors: *Bevan & Whitting; Waterhouse & Winterbotham.*

[3 Chancery Division, 757.]

V.C.B., Aug. 2, 1876.

In re MEREDITH'S TRUSTS.

Power of Appointment—Legacy under Will in exercise of Power void for Excess—. Void Legacy not undisposed of but falling into Residue.

Under an exclusive power to appoint to children, the children being entitled in default of appointment in equal shares, the donee, by will, appointed the whole fund to trustees, upon trust as to £1,200, to pay the income to one of her children, J., for life, and after his death, for his children; and if J. should die without leaving children who should attain vested interests, then that the £1,200 should be "added to and form part of the residue of" the trust estate. The trusts of the residue were in favor of daughters for life with testamentary powers. J. died leaving children.

It being admitted that the gift to J.'s children was excessive:

Held, that on J.'s death the £1,200 was not undisposed of, but was well appointed by the residuary gift.

PETITION. By a marriage settlement dated the 8th day of June, 1814, a sum of stock was settled upon trust for Mary, shortly afterwards the wife of John Meredith, for life, and after her decease in trust for "all and every or such one or more" of her children as she should by deed or will appoint; and in default of appointment, to all her children in equal shares; and the settlement contained a hotch-pot clause.

758] *Mary Meredith died on the 3d of January, 1860, having by will dated the 16th of April, 1858, purporting to be made in exercise of the power, appointed that after her decease the trustees should stand possessed of the property to which the power extended, upon trust to convert, and pay over the whole of the proceeds to two other trustees, upon trust in the first place to pay three pecuniary legacies to three of her children respectively, and upon further trust to invest in the names of her (testatrix's) trustees the sum of £1,200, and pay the annual income thereof to her son John for life, and after his death in trust for all the children of the said John in equal shares. And in case the said John should die without leaving any child or children who being a son or sons should attain twenty-one, or being a daughter or daughters should attain that age or marry, then testatrix directed that the said sum of £1,200 should "be added to and form part of the residue of" her trust estate. She then directed her trustees to invest in their names another sum of £1,200, and pay the income to her daughter Anne Jane Billington for life, and after her death to stand possessed in trust for all the children and remoter issue of Anne Jane Billington, *per stirpes*, in equal shares. And in case the

said Anne J. Billington should die without leaving any child or remoter issue, who being a son should attain twenty-one, or being a daughter should attain twenty-one or marry, testatrix directed that the said sum of £1,200 should "be added to and form part of" her said trust estate; and upon further trust as to the residue of the said trust estates, to divide the same into two equal portions, and as to one of such portions, to invest the same in the names of the said trustees, and pay the annual income thereof unto her daughter Margaret Meredith during her life, and after her decease in trust for such person or persons and in such manner as the said Margaret Meredith should by deed or will appoint; and in default of appointment, in trust for her children as therein mentioned; and upon further trust, as to the remaining half-part or share of the said residue, in trust to invest the same and apply the income arising from such remaining half-part for the benefit of her daughter Mary Emily Meredith, her children and appointees, and ultimately to dispose of the principal in the manner thereinbefore *directed concerning the one half-part or share [759 to be vested for the benefit of the said Margaret Meredith.

Mary Meredith had nine children, namely, David, Thomas Orton, the said John, Elizabeth, Maria Louisa, the said Margaret, the said Anne Jane Billington afterwards and now Anne Jane Bolver, the said Mary Emily, and Martha.

By a deed poll dated the 30th of July, 1860, under the hands of Margaret Meredith and Mary Emily Meredith, Margaret, in exercise of the power given to her by the will, appointed that after her own decease the half-part or share which she had power to appoint of the residue of the trust estates by the will appointed, including particularly in such residue the said sums of £1,200 and £1,200, subject only to the life interests in the income thereof respectively of the said John Meredith and Anne Jane Billington respectively, should go, remain, and be in trust for her the said Margaret Meredith, her heirs, executors, and administrators respectively; and Mary Emily Meredith in like manner appointed that after her own decease the half-part or share which she had power to appoint of the residue of the trust estates (following the same form of words) should go, remain, and be in trust for her the said Mary Emily Meredith, her heirs, executors, and administrators respectively.

On the 14th of April, 1874, John Meredith, the son, died, leaving several children.

It was admitted that the appointment by Mary Meredith's will, so far as it extended to the children of John Meredith,

was bad for excess; but the question arose whether, on the death of John Meredith, the £1,200 fell by the operation of the will into the residue of Mary Meredith's trust estate, or was undisposed of, and passed under the marriage settlement to the children of Mary Meredith in equal shares; and so also as to the other sum of £1,200.

A prior question was raised on behalf of the children of Mary Meredith. It was argued that the appointment by the will of one moiety of the residue, so far as it extended after Margaret's decease to a trust for such persons as she should by deed or will appoint—was bad for remoteness, and so also as to the appointment of the other moiety.

760] **Kay*, Q.C., and *Chapman Barber*, for the petitioner, the executor of Margaret and also of Mary Emily Meredith: Upon the first question, the gift here is a direction to pay to Margaret for life, and then a trust for such persons as she shall "by deed or will" appoint. That this is a good execution of a power to appoint to Margaret appears from *Falkner* v. *Butler* (1); *Bray* v. *Bree* (2); *Phipson* v. *Turner* (3); *Wollaston* v. *King* (4); *Slark* v. *Dakyns* (5).

Then as to the second question, namely, what became of the £1,200 on the death of John, whether it fell into the residue under the will, or was undisposed of—we say it fell into the residue; and rely upon *Oke* v. *Heath* (6) and *Falkner* v. *Butler*.

Sir *H. Jackson*, Q.C., and *Jemmett*, for the legal personal representatives of David Meredith and of Maria Louisa Meredith, afterwards Elias, respectively, after some discussion, admitted the validity of the residuary gifts: As to the question whether the £1,200 falls into residue, the will itself declares that the falling into residue shall be contingent on a particular event, which event has not happened. Whenever this is the case, the general rule that gifts which fail fall into residue is excluded by the testator's own language. The event upon which alone the £1,200 was to fall into the residue is by the will declared to be the death of John without children who shall attain twenty-one or marry. But John died leaving children—hence the £1,200 is excluded from falling into the residue, and is unappointed: *Ratcliffe* v. *Hampson* (7); *Easum* v. *Appleford* (8).

In *Brudenell* v. *Elwes* (9) it was held that failure of an

(1) Amb., 514.
(2) 2 Cl. & F., 453.
(3) 9 Sim., 227.
(4) Law Rep., 8 Eq., 165.
(5) Law Rep., 15 Eq., 307; Law Rep., 10 Ch., 35.
(6) 1 Ves. Sen., 135.
(7) 1 Jur. (N.S.), 1104.
(8) 10 Sim., 274; 5 My. & Cr., 56.
(9) 1 East, 442.

intermediate gift will not accelerate the subsequent gift. Hence every limitation of the £1,200 after the life estate given to John is void.

Kekewich, for the legal personal representatives of John Meredith.

Fellows, for Anne Jane Bolver.

**Dunning*, for another child of Mary Meredith: [761 Margaret's power of appointment never extended to the £1,200: *Page* v. *Leapingwell* (1).

The following remarks of Lord Hatherley in *In re Harries' Trust* (2), although the decision went the other way, govern this case (3): "If there is a definite fund subject to a power of appointment by will, and a will purporting to be made in exercise of that power, and appointing one sum, part of the fund, to one person, and another sum, other part of it, to another, and 'all the rest,' or 'all the remainder' of the fund to a third, then, according to *Easum* v. *Appleford* (4), the third appointee cannot claim any share which may lapse in consequence of the death of either of the former appointees in the lifetime of the testator." Here the failure is not owing to lapse from death, it is owing to excessive appointment; but the principle remains.

Kay, in reply: All *Page* v. *Leapingwell* means is, that where out of a fund fixed amounts are given, and the rest of the fund is given as residue, the rest of the fund is as much a fixed amount as any other, and is not to be added to by lapse. *In re Harries' Trust* follows and confirms this.

Bacon, V.C.: There remains only one question to be decided in this case.

It arises upon the exercise by the will of Mary Meredith of a power of appointment given to her by her marriage settlement.

Mr. Dunning has produced one of the most recent cases on the subject, and it appears that the decision in that case does really govern the present wholly, as matter of law.

The question of construction, then, which it is my present duty to decide, scarcely arises. It can hardly be called a question at all; and I might be content to rest my decision upon the authority of this very case of *In re Harries' Trust.*

[His Lordship read the terms of Mary Meredith's will, observing *that the testatrix, the donee of the power, [762 expressed herself as dealing with one entire thing, viz., the

(1) 18 Ves., 463.
(2) Joh., 199.
(3) Joh., 204.
(4) 10 Sim., 274; 5 My. & Cr., 56.

whole of the property to which the power extended; and continued:]

She gives the income of £1,200 to John for life, and after his death, in trust for his children, a gift which it cannot be disputed is invalid. She then says that if John should die without leaving children the £1,200 "shall be added to and form part of the residue of my trust estate." What I am asked to do is practically to read the will as if these words were not in it. How is it possible to read these words as not being governed by that canon of construction which is laid down by the highest authority in the cases that have been cited?

The case is absolutely clear after the decisions in *Oke* v. *Heath* (1) and *Falkner* v. *Butler* (2); and if I had not these authorities to guide me, I should say, upon the construction of this will, there can be no reasonable doubt.

The single case which seems to interfere with this conclusion is *Ratcliffe* v. *Hampson* (3); but inasmuch as it does not apply to the point so directly as to oblige me to follow it, I pass it over, with the observation that it does not appear to me clear that *Ratcliffe* v. *Hampson* would be followed if it were submitted to a higher authority.

I have no doubt that upon the true construction of the will the two sums of £1,200 do, upon the deaths of the respective tenants for life, fall into the residue of the testatrix's trust estate.

The order will be as prayed; the costs of all parties coming out of the estate.

Solicitors: *Meredith, Roberts & Miles; Field, Roscoe & Co.*, agents for Atkinson & Co., Manchester; *Gregory, Rowcliffes & Rawle.*

(1) 1 Ves. Sen., 135. (2) Amb., 514. (3) 1 Jur. (N.S.), 1104.

[3 Chancery Division, 763.]

V.C.B., Aug. 2, 1876.

763] *MOASE v. WHITE.

[1875 M. 24.]

Will—Devise of "Real Estate"—Leaseholds—Contrary Intention—Wills Act (1 *Vict. c.* 26), *s.* 26.

Testator devised and bequeathed the residue of his real and personal estate upon trust to convert his residuary personal estate, "except leaseholds," and out of the income of the investments and the rents and profits of the real estate to pay certain annuities, and accumulate the residue of the income during his wife's life; and after her death upon trust as to all his "real estate" at, in, or near E., and in or near W., out of the rents and profits during the life of J. T. W. to repair and insure, and to

pay an annuity, and subject thereto in trust for J. T. W. and his assigns for life, and after his decease for his first and other sons successively in tail male, with remainder to his daughters equally as tenants in common in tail, with limitations over in the nature of cross remainders.

Testator had both freeholds and leaseholds for a term of 1,000 years at E.; at W. he had leaseholds only, for a term of 900 years:

Held, that the leaseholds at E. and also at W. passed under the above devise, the exception of leaseholds in the gift of residue not showing a contrary intention.

FURTHER CONSIDERATION. Henry Court, of Midhurst, who died on the 3d of October, 1874, by his will dated the 20th of February, 1874, after bequeathing specific chattels to his wife, and devising the messuage, garden, lands, and hereditaments then in his own occupation at Midhurst, to his wife for life, gave out of his pure personal estate a charitable legacy, and bequeathed an annuity and several pecuniary legacies. He devised, after the decease of his wife, all his messuage and garden at Midhurst, then in the occupation of John Caizley Gosden, to Emily Jane Moase. He then devised and bequeathed all the residue of his real and personal estate to Alfred Thomas Purser and Maurice Moase, upon trust to get in and convert "my said residuary personal estate (except leasehold)" into money, and invest the produce, and "out of the income of the said residuary personal estate, produce, and investments, and the rents and profits of my real estate," to pay an annuity of £80 to his wife for life, and the annuity before given, and to accumulate the residue "of such income and rents and profits" for twenty-one years, if his wife *should so long live; [764 and after her death, "upon trust as to all my real estate situate at, in, or near Emsworth, in the county of Southampton, and in or near Westbourne in the said county of Sussex," out of the rents and profits: during the life of James Thomas White to repair and insure, and to pay an annuity of £20 to Anne, widow of James Court White; and subject thereto in trust for James Thomas White and his assigns for life, and after his decease in trust for the first and other sons successively of James Thomas White, and the heirs of the body of each such son, and, failing such issue, in trust for the daughters of James Thomas White equally as tenants in common, and the heirs of their respective bodies, with trust limitations in the nature of cross remainders. He continued: "And as to my leasehold messuages, lands, and hereditaments now in my own occupation," and in the occupation of William Shotter, at Midhurst aforesaid, upon trust out of the rents and profits during the life of James T. White, to repair and insure, and subject thereto upon trust to permit the same to be enjoyed "as nearly as the differ-

ences in tenure will allow, according to the limitations and provisions thereinbefore contained concerning my real estate at Emsworth and Westbourne hereinbefore devised," but so that his leasehold tenements held for years should be subject to an existing limitation over on the death of any tenant in tail by purchase of any freehold hereditaments under the age of twenty-one years without leaving issue in tail living. From and after the decease of his wife, he directed that his trustees should sell and dispose of "the residue of my real estate, including the residue of my leasehold estate," and should stand possessed of the produce thereof, and of the sale and conversion of his residuary personalty, upon trust for the children of his late sister, Elizabeth Purser, as therein mentioned. The testator appointed James Thomas White, Alfred Thomas Purser, and Maurice Moase his executors.

The suit was instituted by the children of Elizabeth Purser against J. T. White, A. T. Purser, and M. Moase, for administration.

The Chief Clerk by his certificate found that the testator was at the time of his death seised of freehold property at Emsworth, and possessed of leaseholds there, for a term of 1,000 years from the 18th of May, 1836, and was not seised 765] of any freeholds at *Westbourne, but was possessed of leaseholds at Westbourne held on a lease for 900 years from the 20th of February, the 24th of Elizabeth. He reserved the question of whether the leaseholds at Emsworth and in or near Westbourne, or either of them, were included in the above devise.

Sir *H. Jackson*, Q.C., and *Freeman*, for the plaintiffs: The leaseholds did not pass under the devise of "all my real estate." The question is one of intention. Sect. 26 (1) of the Wills Act does not apply if a contrary intention appears by the will.

The expression "my personal estate except leaseholds" shows that the testator considered leaseholds to be personal, not real, estate. Then he gives the Emsworth and Westbourne property in a series of limitations, which are applicable to freeholds only; and in dealing with property expressly and admittedly leasehold, he settles it upon lim-

(1) Sect. 26 of the Wills Act is as follows:

"A devise of the land of the testator, or of the land of the testator in any place . . . . or otherwise described in a general manner, and any other general devise which would describe a . . . leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the leasehold estates . . . . to which such description shall extend . . . . as well as freehold estates, unless a contrary intention shall appear by the will."

itations by reference, "as nearly as the differences in tenure will allow," to the "real estate" at Emsworth and Westbourne, thereby showing that by real estate he meant a different tenure to leasehold, namely, freehold.

In *Emuss* v. *Smith* (1), by a will before the Wills Act, freeholds were devised as freehold. With the freeholds was a small piece of leasehold. By a codicil after the 1st of January, 1838, the will was brought under the operation of the Wills Act. After the codicil the testator acquired the fee in the leasehold; but even in this case, and notwithstanding sect. 24 of the Wills Act, the leasehold was held not to have passed.

Kay, Q.C., and *James G. Wood*, for the defendant James Thomas White; and *F. G. Wood* for the other defendants: It is admitted that but for contrary intention the words "real *estate" will pass leaseholds. What, then, [766 was the intention? The testator desires that out of the income of the residuary personalty, exclusive of leaseholds, "and" out of "the rents and profits" of his "real estate," annuities were to be paid. Is it reasonable to suppose he did not mean the annuities to come out of the income of the leaseholds as well as of the freeholds? No doubt the real estate at Emsworth and Westbourne is limited as freehold, and it is referred to as if it were freehold; but at Emsworth there is freehold estate which will answer both conditions. The effect of the statute is to alter the presumption. Formerly the presumption was that real estate would not carry leaseholds; now the presumption is that it will.

Hence, in this instance, contrary intention being out of the way, the statute applies—as to the property at Westbourne indisputably, even under the old law, for at Westbourne there is no freehold—and as to the property at Emsworth, under the statute.

Sir *H. Jackson*, in reply.

BACON, V.C., after reading the words of the statute, the finding of the Chief Clerk, and the language of the will, and observing on the length of the terms of the leaseholds, continued:

The testator appears to have intended to give all his property at Emsworth and Westbourne as an entire thing.

I cannot entertain any doubt that the leaseholds at Emsworth, and also the leaseholds at Westbourne, passed by this devise.

Declaration accordingly.

Solicitors: *Rogerson & Ford.*

(1) 2 De G. & Sm., 722.

[3 Chancery Division, 767.]

V.C.H., March 14, 15, 1876.

767] *CORNMELL v. KEITH.

[1875 C. 260.]

Marriage Settlement—Covenant to settle—Present and Future Property—Contingent Reversionary Interest.

Covenant in marriage settlement to settle property to which the wife then was or she or her husband in her right should during the coverture become entitled.

At the date of the settlement a trust fund stood so limited that on the death of the wife without issue one moiety thereof would belong to her, subject to the life interest therein of her husband, as her share of an intestate's estate:

Held, that the wife's contingent reversionary interest in this fund was bound by the covenant.

CAUSE FOR TRIAL. By an indenture of settlement made in December, 1852, on the marriage of Mary Jane Carruthers with James Buchanan, certain property of Mary Jane in possession was settled upon trusts for or for the benefit of Mary Jane for life, and after her death for the benefit of her child or children, if any, and if there should be no child, then, in case Mary Jane should die in the lifetime of James Buchanan, upon trust for Charles Bladen Carruthers, his heirs, executors, administrators, and assigns absolutely; and James Buchanan and Mary Jane jointly for themselves, their heirs, executors, and administrators, and each of them separately for himself and herself, his and her heirs, executors, and administrators covenanted with the trustees, their executors and administrators, "that if the said Mary Jane Carruthers now is, or if at any time or times during the said intended coverture the said Mary Jane Carruthers or the said James Buchanan in her right shall become entitled by gift, descent, succession, or otherwise howsoever to any real or personal estate, property, or effects of the value or to the amount of £100 or upwards at any one time (other than and except interests which are or shall be restricted to the life of Mary Jane Carruthers, or which, whether so restricted or not, are or shall be settled and limited to her separate use and disposal) the same shall be forthwith at the costs of the trust estate conveyed, transferred, assured,
768] *and paid to the trustees for the time being of the settlement upon the trusts declared concerning the property settled and assured by Mary Jane Carruthers, or such of them as shall be subsisting or capable of taking effect, or as near thereto as the natures and qualities of the said property respectively will admit."

At the date of the settlement Charles Bladen Carruthers was entitled in remainder expectant on the death of Mary Jane without issue, and subject to the life interest therein of James Buchanan, to a trust fund of about £7,500 consols as the legal personal representative of M. W. Carruthers, an intestate then deceased. The beneficial interest in the intestate's estate then belonged to Charles Bladen Carruthers and Mary Jane, in equal shares.

Mary Jane died on the 1st of September, 1869, without having had any child.

Charles Bladen Carruthers died on the 29th of September, 1869, having by will appointed the plaintiffs the trustees and executors thereof.

James Buchanan died on the 2d of June, 1875, having by will appointed the defendants executors thereof.

The question was whether the fund was bound by the covenant.

Dickinson, Q.C., and *Millar*, for the plaintiffs: The only question is, what is the true construction of this covenant? At the date of the settlement and time of the marriage, this was an interest which was reversionary and contingent, and it is submitted that such a covenant applies to such an interest, and that it was assignable.

[HALL, V.C., referred to the case of *Grafftey* v. *Humpage* (1).]

That case is not entirely in point; it is, in fact, not so strong as the present. In *Dering* v. *Kynaston* (2) the question decided was that a mere contingent interest was not included in a covenant to assign and settle "all other the property of every kind of or to which" the lady "then was or should thereafter be or become possessed, interested, or entitled." That was a case of real estate. That case will probably be referred to as being against the plaintiffs, *but it really is an authority in their favor, [769 as it shows that there is no objection to the interest being reversionary. The decisions in the cases of *Re Hughes' Trusts* (3), *In re Viant's Settlement Trusts* (4), which was a very strong case, *In re Pedder's Settlement Trusts* (5), which is capable of being reconciled with the decision in *Re Hughes' Trusts*, *In re Clinton's Trusts* (6), and *In re Mackenzie's Settlement* (7), are in favor of the plaintiffs' contention.

(1) 1 Beav., 46.
(2) Law Rep., 6 Eq., 210.
(3) 4 Giff., 432.
(4) Law Rep., 18 Eq., 436.
(5) Law Rep., 10 Eq., 585–588.
(6) Law Rep., 13 Eq., 295.
(7) Law Rep., 2 Ch., 345.

[They also referred to *Atcherley* v. *Du Moulin* (1), and *Caldwell* v. *Fellowes* (2).]

Eddis, Q.C., and *F. A. Lewin*, for the defendants: In this settlement the husband, wife and children were purchasers of the fund in question, which was placed in a peculiar position, as it could not fall into possession until the death of husband and wife without issue of the marriage; therefore, until every person who was a purchaser under the settlement was dead, no one could take. No doubt C. B. Carruthers was the wife's next of kin at her death. He was, however, a mere volunteer under this settlement, and a stranger to the consideration of marriage. There is no recital in the settlement to restrain the covenant. The theory is that this particular fund is subject to the trusts of the settlement, but it is submitted that that cannot be, as that would be to give effect to this voluntary trust. The intention of such a covenant is to prevent the marital right of the husband from attaching, but in this case it never could arise. There could be no change affecting this fund during the coverture. The husband never could exercise any marital right over it. The case of *Dering* v. *Kynaston* (3) is a precise authority in the defendants' favor; and the decision in *Atcherley* v. *Du Moulin* is also distinctly in point. The case of *Hoare* v. *Hornby* (4), where Vice-Chancellor Knight Bruce commented upon the decision in *Grafftey* v. *Humpage* (5), as did Vice-Chancellor Wickens in *In re Clinton's* 770] **Trusts* (6), and *In re Edwards* (7), are also in favor of the defendants' contention. *Grafftey* v. *Humpage* (5) and *Re Hughes' Trusts* (8) cannot be reconciled with those cases. *In re Mackenzie's Settlement* (9) was a very different case from the present. That was a strong case, and, as in that, so the words in the other cases cited could hardly have suggested a doubt in the mind of any judge. The question is, what was the intention of the parties about to be married in reference to the funds which they might be entitled to, but not mentioned in the settlement? Did they intend to include contingent interests, and that neither the parents nor the children should touch them, but that they should go to a volunteer. It is quite clear that the parties could not have intended that this particular fund should be subject to the settlement, which was made for the benefit of the wife and children. The language of this covenant shows

(1) 2 K. & J., 186.
(2) Law Rep., 9 Eq., 410.
(3) Law Rep., 6 Eq., 210.
(4) 2 Y. & C. Ch., 121.
(5) 1 Beav., 46.
(6) Law Rep., 13 Eq., 295.
(7) Law Rep., 9 Ch., 97.
(8) 4 Giff., 432.
(9) Law Rep., 2 Ch., 345.

that interests which could not fall in during the coverture were not intended to be included in it. It could not apply to interest which could not accrue during the trusts, and be transferred forthwith to the trustees. The case being completely governed by the decisions in *Dering* v. *Kynaston* (1) and *Atcherley* v. *Du Moulin* (2), a declaration cannot be made in favor of the plaintiffs without overruling those cases.

Dickinson, in reply: This case shows the wisdom of Vice-Chancellor Wickens' observations in *In re Clinton's Trusts*. The difficulty felt has been raised in consequence of not following the words to be construed; and in guessing at the intention. The case resolved itself into a comparison of two classes of cases: the one where the words "now is" are to be found, and the other in which they are not. The words here are large enough to sweep in every interest of the wife. The husband survived his wife for some years, and yet he never instituted any proceedings to recover the fund.

HALL, V.C.: I have had an opportunity of further looking at the cases which *were referred to yesterday, [771 and it appears to me that the plaintiffs are entitled to a declaration that this fund belongs to them.

How would the matter stand if I were construing the settlement irrespective of the authorities? The settlement deals, in the first place, with certain funds which the wife had in possession, and which, no doubt, were transferred to the trustees when the deed was executed, or immediately afterwards, and held upon trusts in which the husband had no interest whatever. The husband brought nothing, as I understand, into settlement. The intention of the settlement was to protect the wife only, and the trusts are for the benefit of children of this marriage only.

The question which has arisen is whether the fund mentioned in the bill comes within the scope of the covenant. Was it in the same position as the property which was specifically settled. If it were not included the husband would take it as the legal personal representative of his wife. If I had to consider probabilities, nothing, as it seems to me, would be more improbable than that this fund, not specifically settled, but which on the happening of certain events would fall into possession, should not be liable to be disposed of by the wife—even though it should not fall into possession until after her death—that though the husband should not be entitled to anything out of the present fortune, yet that something should be left derelict, and be taken by

(1) Law Rep., 6 Eq., 210. (2) 2 K. & J., 186.

him as the legal personal representative of his wife. The covenant was a contract by both husband and wife jointly, and by each separately with the trustees of the settlement that if the wife then was, or if at any time should become —but I may leave the latter words out of consideration— entitled to any real or personal property of the value or to the amount of £100 or upwards at any one time it should be transferred to the trustees upon the trusts declared. I may observe, that as to the words, of the value or to the amount of £100 or upwards, it has been decided that they do not mean the actual value of the thing if reversionary, but the property as if in possession, i.e., considering it as if in possession though in fact in reversion. The covenant is a contract that such real and personal property as the wife then was entitled to should be settled, and I apprehend that according to the ordinary construction of language this 772] *reversionary interest was personal property to which she was entitled. It should be observed, that there was an exception from the settlement of the wife's property settled and limited to her separate use and disposal.

The object of the settlement being merely to exclude the marital right of the husband, it would be extremely improbable that the wife should not deal with any reversionary interest, and exclude his marital right. The trusts were for the wife for her life, and for her children, but failing them (an event which happened) or her predeceasing her husband, for her only surviving brother, Charles Bladen Carruthers, and sole next of kin, and not for next of kin generally. The brother, Charles B. Carruthers, was as much the object of the marriage contract as the wife and children were; therefore there is nothing in the argument that these trusts being for a person not within the scope of the consideration of marriage, the settlement was for that reason and to that extent bad. The covenant is that the property should be forthwith assured to the trustees. That is not inconsistent with including anything that was in reversion. The assurance might be effected as conveniently after the marriage as before. Supposing the fund had not fallen into possession until after the wife's death, could it be doubted that it would be subject to the trusts in favor of the children? It is manifest therefore that the covenant applies to property which from its nature would not and could not be subject to all the trusts, but to such of them as were subsisting or capable of taking effect. And there being a trust in favor of Charles B. Carruthers, in consequence of the failure of the preceding trusts, why should it not fall within the words "subsisting or capa-

ble of taking effect?" So to hold would be clearly within the scope and spirit of that trust. The words may be interpreted to mean that regard must be had to the nature and quality of the property, and whether it was real or personal, which had become subject to the trusts, and whether it was reversionary or contingent. That is the proper construction. But I do not think it necessary to rest my judgment upon that. Having regard to the special language of this covenant, it appears to me that this case might be decided without reference to any of the authorities. *I cannot, [773 however, pass over the cases without some observations. In *Atcherley* v. *Du Moulin* (1) the language is not the same as in this case. In *Dering* v. *Kynaston* (2) the covenant was one of a remarkable character, and the decision is not applicable to this case. *Caldwell* v. *Fellowes* (3) is an express authority, and so is *In re Mackenzie's Settlement* (4)—a case in which the question of value is considered—in favor of the plaintiffs' contention. The decision in *In re Pedder's Settlement Trusts* (5) was quite consistent with previous decisions, and so was the decision in *In re Clinton's Trusts* (6). It appears to me that the plaintiffs, as the executors of C. B. Carruthers, are entitled beneficially, and there must be a declaration to that effect, and an order that the costs must be paid as between solicitor and client out of the fund. I may take this opportunity of stating that I am by no means disposed to put a narrow construction upon covenants like this. Conveyancers have struggled to make them sweep in every kind of property, and the form of the covenant has from time to time been added to to accomplish that object.

Solicitors: *Walton, Bubb & Walton; Lewin & Son*, agents for Daubeny & Wilson, Bath.

(1) 2 K. & J., 186.
(2) Law Rep., 6 Eq., 210.
(3) Law Rep., 9 Eq., 410.
(4) Law Rep., 2 Ch., 345.
(5) Law Rep., 10 Eq., 585–588.
(6) Law Rep., 13 Eq., 295.

[3 Chancery Division, 773.]

V.C.H., June 15, 1876.

CROOK v. HILL.

[1869 C. 163.]

Will—Gift to "Children" of Testator's Daughter—Illegitimate Child en Ventre sa Mère at date of Will and of Testator's Death.

A bequest in favor of a woman's illegitimate child *en ventre sa mère* at the date of the will though not born until after the testator's death, is not contrary to public policy.

A testator, whose daughter M. had with his knowledge gone through the cere-

mony of marriage with J. C., her deceased sister's husband, and had had two children by him, made his will at a time when he knew she was again *enceinte*. He 774] thereby gave leaseholds to trustees on trust for "my daughter *M., the wife of J. C.," for her life, with remainder to "the child or children of my said daughter M. C." as she should appoint, and in default for her child or children equally, and if none, then over. The testator died three months before the third child was born. M. appointed to the two children born at the date of the will, the child of which she was then *enceinte*, and a fourth child begotten and born after the testator's death.

The House of Lords having decided that the two children born at the date of the will were sufficiently designated, and that they took under the gift in the will:

Held, that the child *en ventre sa mère* at the date of the will also took under the gift, but that the child begotten and born after the testator's death could not take.

FURTHER consideration. The question now argued was whether an illegitimate child, the offspring of the marriage of a lady with her deceased sister's husband, and *en ventre sa mère* at the date of the will and of the death of the lady's father, was entitled to share the benefit of gifts in favor of the lady's "child or children" contained in the will.

It had already been decided in the same case that the illegitimate children of the lady who were the offspring of the same marriage and were born before the date of the will were so entitled (1).

John Hill, by his will, dated the 9th of March, 1859, forgave his "son-in-law John Crook" all sums of money due from him, and bequeathed to trustees certain leasehold messuages upon trust, during such part of his estate or term therein as his "daughter Mary, the wife of the said John Crook," should live, to pay the rents to her for her separate use, independent of "her present or any after-taken husband," and subject thereto he declared that after her death the said hereditaments should be held upon such trusts for the benefit of all and every or such one or more, exclusively of the other or others, of "the children or child of my said daughter Mary Crook" as she should appoint, and in default "upon trust for the child, if only one, or all the children, if more than one, of my said daughter Mary Crook," who being a son should attain twenty-one, or being a daughter should attain that age or marry. But if there should not be any child of his said daughter Mary Crook who being a son should attain twenty-one, or being a daughter attain 775] that age or marry, the testator declared *that, subject to any appointment made in exercise of the power aforesaid, the said hereditaments should be held upon similar trusts in favor of his daughter Emma Hill and her child or children.

The testator died on the 22d of March, 1859. His daugh-

(1) Law Rep., 6 Ch., 311; Law Rep., 6 H. L., 265.

ter Mary, referred to by the testator in his will as "my daughter Mary, the wife of the said John Crook," had in the year 1851, with the full knowledge of the testator, gone through the ceremony of marriage with John Crook, who had been the husband of her deceased sister Sarah Ann. Sarah Ann Crook died in 1851, and the union of John Crook and Mary Crook was always looked upon by the testator as an existing marriage. Two children of Mary Crook were born after this marriage, and during the lifetime of the testator, viz., Sarah Alice, who was born in November, 1854, and Ernest William, who was born in July, 1858. At the date of the testator's will Mary Crook was, and for about six months had been, with the knowledge of the testator, *enceinte* with another child, namely, Robert Crook, who was born about three months after the testator's death, on the 27th of June, 1859.

Mary Crook had another child, named Edward Crook, who was born after the testator's death on the 11th of June, 1860; she never had any other issue, and lived with her husband John Crook until her death. She made a will in exercise of her power, in which she described herself as "Mary Crook, wife of John Crook," and thereby appointed the property subject to the power upon trust for her "four children, Sarah Alice, Ernest William, Robert, and Edward," or such of them as should attain twenty-one or marry, in equal shares.

The bill in this suit was filed by Ernest William and Sarah Alice Crook, the two children born in the testator's lifetime, against the trustees of his will and the infant Robert Crook, for a declaration that the plaintiffs, and, if the court shall be of such opinion, the defendant Robert Crook, were intended by the testator's will to take as children of the testator's daughter Mary Crook.

Dickinson, Q.C., and *F. H. Colt*, for the plaintiff: There is no question that the illegitimate child begotten and born after the testator's death cannot take, and we submit to the court the question whether the child *en ventre sa mère* can.

**Hinde Palmer*, Q.C., and *Thurstan Holland*, for [776 the two children Robert and Edward Crook: As to Edward, the child born a year after the testator's death, it may be difficult to contend upon the authorities that he can take under this will, though the observations of Lord Eldon in *Gordon* v. *Gordon* (1) and of Lord Justice James in *Occleston* v. *Fullalove* (2) show that the supposed rule that unborn

(1) 1 Mer., 141, 152.
(2) Law Rep., 9 Ch., 147, 160.

illegitimate children cannot by any possibility be provided for is inadmissible. But we contend that Robert, at any rate, the child *en ventre sa mère* at the date of the will and the death, is clearly entitled. Had he been actually born before the death, there would have been no doubt, and being *en ventre sa mère* he was to all intents and purposes an existing child within the principles laid down in *Occleston* v. *Fullalove* and *Hill* v. *Crook* (1). The rule excluding illegitimate children from taking under a gift to children is founded upon two considerations, first, the uncertainty as to the object of the gift; secondly, public policy and the supposed discouragement of immorality. Now, the uncertainty in such cases is only the uncertainty of paternity; and where, as here, the child to take is the child of a designated woman and not the child of a designated man (which distinguishes the case from *Pratt* v. *Mathew* (2)), no element of uncertainty can exist even as to her future children: *Gordon* v. *Gordon;* Jarman on Wills (3); unless the child was to be hers by some particular man, which is not the present case.

Neither is this child Robert precluded from taking on the ground of public policy. The doctrine of public policy as applied to provisions for illegitimate children arose from the desire to discourage concubinage; but here this child was procreated, and was in the eye of the law actually in being at the date of the will and of the testator's death. The testator knew when he made his will that his daughter was then *enceinte;* the analogy is not to a gift in consideration of future cohabitation, but to a bond in consideration of past cohabitation, which is good; and thus the case comes exactly within the principles enunciated by Lord Eldon in *Gordon* v. *Gordon*, by Lord Justice James in *Occleston* v. *Fullalove* and **Crook* v. *Hill* (4), by Vice-Chancellor Stuart in *Holt* v. *Sindrey* (5), and by the House of Lords in *Hill* v. *Crook* (6) and *Dorin* v. *Dorin* (7). These cases all show that there is nothing contrary to public policy in making provision for illegitimate children, at all events when actually begotten; and in *Occleston* v. *Fullalove* (1) Lord Justice James stigmatizes the neglect of a father to do so as a "great crime."

Moreover, when a question of morality and public policy is involved, the court cannot shut its eyes to the fact that

(1) Law Rep., 6 H. L., 265, 278.
(2) 22 Beav., 328, 339.
(3) Vol. ii, p. 228.
(4) Law Rep., 6 Ch., 811.
(5) Law Rep., 7 Eq., 170, 176.
(6) Law Rep., 7 H. L., 568, 573.
(7) Law Rep., 9 Ch., 147, 160.

amongst our fellow subjects in the colonies laws have been passed which legalize marriage with a deceased wife's sister, which laws have, in due course, been sanctioned by the Crown.

The whole question, then, comes to this: is there in the will a sufficient designation of this illegitimate child? For it is clear from the authorities that an illegitimate child *en ventre sa mère* may take by particular description before its birth: *Dawson* v. *Dawson* (1); *Blason* v. *Blason* (2); *Earle* v. *Wilson* (3); *Medworth* v. *Pope* (4); and here we contend that, looking at the fact that the testator considered the marriage as a valid marriage, John Crook as his son-in-law, his daughter Mary as John Crook's wife, and her children as her legitimate children and his own grandchildren, there is upon the face of the will sufficient designation to entitle this child to the benefit of the provisions contained in it.

Ince, Q.C., and *Whitaker*, for the surviving trustee of the testator's will.

Begg, for the representatives of a deceased trustee.

HALL, V.C.: It appears to me that the child of which this lady was *enceinte* at the date of the testator's will comes within the class of "children" described as "the children of my daughter Mary Crook," and is capable of taking under the power of appointment exercised by *the [778 daughter's will. It is the general rule that a child *en ventre sa mère* comes within the expression "child or children," and is included in a trust in favor of children whether described as children *in esse*, living at the death, begotten and to be begotten, begotten and born, or in any other similar way.

Is there, then, anything in this case, irrespective of the question of policy, which should give to the word "children" a different meaning? The case both before the Lords Justices and before the House of Lords has proceeded on the view that the testator had thought proper to make a will based upon the assumption that the union of his daughter Mary with John Crook was a legal marriage, and all his dispositions for the objects to take under his will are framed upon this footing. It is clear, then, that, meaning, as he did, by the word "children" the issue of that union, he must be taken to have meant to include a child *en ventre sa mère*. The only question is, whether there is anything in public policy which prevents such a child taking. I think there is not, for the child having been already procreated,

(1) 6 Madd., 292.
(2) 10 Jur. (N.S.), 1113.
(3) 17 Ves., 528.
(4) 27 Beav., 71.

there can be no encouragement to immorality in providing for it. Therefore, whether the child is to be considered as claiming under the will of the testator, or under the appointment mader unde the power conferred by his will, the latter being, I consider, the true view, the child is entitled to take. He was an existing child at the date of the testator's will, and as much entitled as if the testator had actually described him as the child of which his daughter was then *enceinte*.

As regards the other child, who was both begotten and born after the testator's death, he cannot take; his taking being against the policy of the law.

Solicitor: *Turner & Son; Wilkins & Blyth.*

[3 Chancery Division, 779.]

V.C.H., June 26, 27, 1876.

779] *JONES v. CLIFFORD.

[1873 J. 10.]

Vendor and Purchaser—Contract for Sale—Condition precluding Inquiry as to Title—Discovery aliunde—Common Mistake—Specific Performance.

The defendant contracted to buy from the plaintiff freeholds and leaseholds under the condition that he should assume that E. M., who died in 1841, was seised in fee of the freeholds, and should not "require the production of or investigate or make any objection in respect of the prior title" thereto.

He accepted the title, and before completion contracted to sell the lands, with a farm of his own adjoining the freeholds, to a sub-purchaser, who discovered, from an inclosure award prior in date to 1841 (as to the effect of which both the plaintiff and defendant had been under a misapprehension), that the freeholds had never belonged to E. M., but at the date of the contract belonged to the defendant himself in fee, subject to a leasehold interest in the plaintiff.

The defendant then refused to complete, and the plaintiff filed her bill for specific performance, stating that she too had discovered that part of the lands she had contracted to sell as leaseholds belonged to her in fee simple, and offering mutual waiver or compensation:

Held, that the defendant was not precluded by the condition or the acceptance of title from taking the objection, and that the court could not decree specific performance; but that, although there was no fraud, yet, there being a common mistake, the defendant was entitled to an inquiry as to the title to the freeholds at the date of the contract.

Obervations upon the authorities as to conditions restricting investigation of title, and upon *Bingham* v. *Bingham* (1).

Semble, the court will, even in the case of a completed contract, give relief against a common mistake without fraud.

By articles of agreement dated the 28th of September, 1871, and made between Richard Jones and his wife, the plaintiff Jane Jones, therein called the vendors, of the one part, and the defendant of the other part, the vendors agreed to sell and the defendant to purchase for £2,350, *inter alia*,

(1) 1 Ves. Sen., 126.

"First, the pieces of land described in the first schedule hereto and the inheritance thereof in fee simple, free from incumbrances;" and secondly, certain hereditaments described in the second schedule thereto as leaseholds.

The agreement provided that the purchase should be completed on the 26th of December, 1871, and as to the title to the freeholds *comprised in the first schedule, it pro- [780 vided in clause 4 as follows: "The purchaser shall assume that E. Mountford, who died on the 22d of April, 1841, died intestate, leaving the said Jane Jones" (i.e., the plaintiff), "his only child and heiress-at-law, him surviving; and that the said E. Mountford was at the time of his death seised in fee simple of the said premises, and shall not require the production of, or investigate or make any objection in respect of the prior title to the said lot, whether such prior title is or not referred to in any abstracted document. The vendors will, however, at their own expense, if required, furnish a statutory declaration by a competent person that the said E. Mountford was in possession or receipt of the rents of the said hereditaments and premises as the owner thereof at the time of his decease, and that the vendors have since received the rents of the said hereditaments." The agreement also provided that all requisitions in respect of the title should be delivered within a specified time, and all requisitions not sent within that time should be considered to be waived; and also that the premises were believed to be correctly described, but that if any error or misstatement should be found in the schedules the same should not annul the sale, but compensation should be made in respect thereof, the amount whereof should be ascertained by arbitration in the usual way.

The first schedule to this agreement comprised three pieces of land in the township of Hopton Upcha, in the county of Montgomery, containing together 2A. 1R. 32P., and numbered 94, 110, and 116 in the plan of the tithe commutation apportionment for the township of Hopton Upcha; and the second schedule comprised about 100 acres of arable and pasture lands and about 120 acres of sheep walks.

In pursuance of the agreement, the vendors duly delivered their abstract of title, and no objection to the title was taken within the time limited in that behalf, the purchaser then believing, as he alleged in his original answer, that the plaintiff had an absolute power of appointment over the hereditaments comprised in the schedules, and that she and her husband were able to make a good title to the freehold hereditaments comprised in the first schedule for an estate

in fee simple, and were absolutely entitled to the leasehold interest in the rest.

781] *The defendant, who, as he alleged, had entered into the contract with the view of re-selling the property together with an estate of his own called the Lower House Farm, to the dwelling house on which the fields Nos. 110 and 116 were contiguous, did not succeed at first in finding a sub-purchaser, and could not complete the purchase within the time named in the agreement. The vendors, however, at his request, and as a matter of indulgence, gave him further time to enable him to carry out the contract. But after waiting some time they found that no steps were being taken towards completion, and a correspondence then ensued between the solicitors of the parties, in which the vendors pressed for completion, and the purchaser desired further time, offering to pay interest on the purchase-money.

Richard Jones, the plaintiff's husband, died on the 12th of July, 1872, and the defendant still failing to complete, after a further correspondence, in which legal proceedings were threatened, the plaintiff, on the 5th of February, 1873, filed her original bill in this suit, alleging that she was seised in fee simple of the freehold hereditaments comprised in the first schedule, and absolutely entitled to the leasehold hereditaments for the residue of the terms of years therein, and praying for specific performance of the agreement. On the 12th of August, 1873, the defendant filed his answer to the original bill, and thereby he admitted that the plaintiff's solicitors had, on the 14th of November, 1871, delivered "a perfect abstract of title as limited by the articles of the agreement," that no objection had been taken to the title, and that his solicitors had ever since retained the abstract, and he stated that he had always been and still was desirous to complete the contract.

However, on the 5th March, 1876, the defendant filed a supplemental answer, in which he insisted that he was not bound to complete the purchase, and raised a defence which was shortly as follows: At the date of his answer the abstract had been perused by his solicitor, but had not been verified; after the answer the solicitor proceeded with the investigation of the title, and the abstract was verified by the plaintiff's solicitor subject to the fourth condition, which precluded the purchaser from investigating the title to the

782] hereditaments comprised in the first *schedule prior to the death of Edward Mountford, whose seisin in fee thereof the purchaser was bound to assume; and prior to the comparison of the abstract with the deeds the defen-

dant's solicitor had made several unsuccessful attempts to obtain inspection of the Hopton inclosure award for the purpose of the title to the Lower House Farm. In September, 1873, the defendant contracted with one Henry Keate for the sale to him of the Lower House Farm, and also of the property which the defendant had contracted to purchase from the plaintiff, and Keate's solicitor, in investigating the defendant's title, succeeded in obtaining an inspection of the Hopton inclosure award, and then, on the 22d of December, 1873, discovered that the freehold pieces of land comprised in the first schedule to the agreement of the 28th of September, 1871, and numbered 94, 110, and 116, had never belonged to Edward Mountford, the plaintiff's father, and not only did not at the date of the contract belong to the plaintiff, but, subject to a term (a few years only of which remained unexpired) which had been created in 1781 and was now vested in the plaintiff, belonged absolutely to the defendant himself; the property in question having been by this award allotted to one Thomas Morgan, through whom the defendant derived his title. The solicitor of the defendant then, on the 23d of December, 1873, wrote to the plaintiff's solicitor stating this discovery, and submitting that the fact of the plaintiff not having the title claimed by her to the most important part of the subject of the contract vitiated the entire contract.

This letter was answered by the plaintiff's solicitor on the 24th of December, 1873, as follows:—

"Dear Sir,

"Lower House.

"I had an appointment with Mrs. Jones to-day, and laid before her yours of yesterday, as to the freehold property contracted to be sold to Col. Clifford. Her surprise was no less than your own seems to have been. Without prejudice to the contract and her right under the same as against Col. Clifford, there seems to be no difficulty in the matter. As you seem to have seen the award, which I could never get at, nor could my client, you must also have seen that the parcels on plan 94, 110, and 116, were allotted *to [783 Thomas Morgan in exchange for an allotment to Joseph Davies and John Francis containing 2A. 3R. 16P., part of a field called The Four Acres, numbered 14 on the sale plan, and there called Lower Llanahereod Meadow. This allotment of 2A. 3R. 16P. was clearly the land of which Mr. Mountford was seised in fee, for the conveyances of which to him Mr. Broughall saw when at my office examining the

deeds. Francis' moiety was purchased by Mr. Mountford in 1825, and was conveyed by deed of feoffment, and Miss Dorothy Davies, one of the witnesses to livery, is still living, and can speak positively to the fact as indorsed on the deed. The other moiety (Davies') was purchased in 1840. Mr. Mountford was at this time between eighty and ninety years of age, and the conveyance was prepared by a Mr. Farmer, of Montgomery, of a moiety of parcels 94, 110, and 116, instead of the allotment to Francis and Davies. In the first moiety the consideration was £19, and for the second £55. The tithe commutation was made after Mr. Mountford's death, and it seems to have set us all wrong, and I suggest the better plan will be simply to substitute in the conveyance from Mrs. Jones the 2A. 3R. 16P. instead of the three smaller pieces allotted to Col. Clifford. As to these, Mrs. Jones will, if required, give absolute covenants for title.

"Yours truly,

"E. MAURICE JONES.

"Messrs. Winnett & Son."

To this letter the defendant's solicitor replied, on the 29th of December, 1873, that his client would not have entered into the contract at all had he known that the freehold land to which the plaintiff was entitled was the 2A. 3R. 16P., and not Nos. 94, 110, and 116; and he maintained that the defendant, having contracted to purchase lands in a situation of great importance to him, could not be asked to take lands in another situation, and was entitled to retire altogether from the contract; he offered, however, to buy the plaintiff's leasehold interest at a ten years' purchase, and to give a fair price for the 2A. 3R. 16P. if Keate would accept the plaintiff's title. The defendant in his supplemental answer then set out further correspondence in which this offer was declined, and pleaded that until the discovery he was entirely ignorant of his title to Nos. 94, 110, and 116, 784] that his chief inducement to enter *into the contract with the plaintiff was that he might thereby acquire Nos. 110 and 116, which lay close to the dwelling house upon the Lower House Farm and materially enhanced its value, and he insisted that as the contract had been entered into under mutual mistake and misapprehension, it was not binding upon him, and that the plaintiff's bill should be dismissed with costs.

The plaintiff then amended her bill, pleaded that the defendant had in fact accepted her title, denied the truth of the alleged discovery, insisted that her title to the heredita-

ments was a good one, and charged that the defendant was by the conditions of his agreement, and by his laches, precluded from taking the objection. She also stated that since the agreement she had discovered that three acres of the hereditaments comprised in the second schedule belonged to her in fee simple, and not merely for a leasehold interest, and that the defendant at the date of the agreement was not (as claimed by him) entitled to the fee simple therein, subject to her leasehold interest; she submitted, however, to waive all claim to compensation on this score, and to recognize the freehold interest as being vested in the defendant if he would perform the agreement in its integrity, and abandon his claim to the fee simple of Nos. 94, 110, and 116. Moreover, if the court should be of opinion that the defendant was not precluded from taking his objection, and it should be sustained on investigation of the title, the plaintiff offered to allow him reasonable compensation under the agreement in respect of the 2A. 1R. 32P., Nos. 94, 110, and 116, upon his allowing her similar compensation in respect of the three acres, charging that in this case there ought to be a decree for specific performance with such compensation.

The amended bill then prayed that, regard being had and subject to the charges made by and submissions contained in it, the defendant might be ordered specifically to perform the agreement, the plaintiff making the usual offer on her part. It appeared that the only requisition which the defendant had made was for a statutory declaration not in the terms of condition 4 that E. Mountford was in possession of the rents as owner, but only as to the heirship of the plaintiff to him, which was duly furnished.

The action now came on for hearing, and was argued upon the facts as stated above.

**Morgan*, Q.C., and *Romer*, for the plaintiff: It is [785 clear from the defendant's own answer that he accepted the title of the plaintiff; and an acceptance of title, unless induced by fraud, cannot be withdrawn; there was, moreover, acceptance by conduct, for the defendant took steps to subsell the property which were inconsistent with an intention to dispute the title, and were evidence of waiver: Dart's Vendors and Purchasers (1); *Simpson* v. *Sadd* (2). At all events, the objection of the defendant is covered by condition 4, which binds him to assume the seisin of E. Mountford, and precludes him from requiring the production of, or investigating or making any objection in respect of the prior title. This is a stipulation that the defendant must accept that title

(1) 4th ed., p. 398. (2) 3 Eq. Rep., 263; 4 D. M. & G., 665; 2 Sm. & Giff., 469.

without objection or inquiry, which, in the absence of fraud, binds him, and is perfectly lawful: *Spratt* v. *Jeffery* (1). A similar question arose in *Hume* v. *Bentley* (2), where, upon a sale by auction of leasehold property, one of the conditions was that the lessor's title should not be shown, and should not be inquired into; and although it appeared on certain acts of Parliament produced by the purchaser, that the lessor had no power to lease the premises, it was held that the condition precluded the purchaser from inquiring into the lessor's title for every purpose, and specific performance was decreed. So here the defendant is not at liberty to show *aliunde* that Mountford had no title: *Hume* v. *Pocock* (3).

In the case of *Harnett* v. *Baker* (4) the condition was founded upon a statement of facts which the vendor was bound to know was erroneous. Here the purchaser had the same means of discovery and knowledge as the vendor.

A vendor need not direct a purchaser's notice to any matter of which the purchaser has actual or implied notice: Dart's Vendors and Purchasers (5); and surely a purchaser must have implied, even if not actual, notice of the state of his own title.

If a vendor, in the *bona fide* belief that he has a good title, enters into a contract containing a condition precluding the 786] purchaser *from investigating any particular part of it, the purchaser cannot, in the absence of fraud, impeach the contract on the ground of a defect in that part of the title which he is restrained from investigating.

Therefore, even if it should turn out that part of the property which the purchaser has bought is his own, by the terms of the contract he cannot take the objection. The award to Mountford was, however, made in 1841, and since that time we have been in receipt of the rents and profits of this property without any acknowledgment of the defendant's right, so that we have a good title by adverse possession, which gives us the right to specific performance.

Again, had it not been for the year and a half time which the plaintiff accorded to the defendant as a pure matter of indulgence, this question would never have arisen, for the purchase would have been completed without this objection having been taken; the only requisition made by the defendant having been that for a statutory declaration of the

(1) 10 B. & C., 249.
(2) 5 De G. & Sm., 520, 525.
(3) Law Rep., 1 Eq., 423; Ibid, 1 Ch., 379.
(4) Law Rep., 20 Eq., 50.
(5) 4th ed., p. 85.

heirship of the plaintiff to Mr. Mountford, which was supplied. So that, if specific performance is not decreed, the defendant will have taken advantage of this delay to obtain in this manner particulars of title wherewith to oust the vendor. On the whole, the plaintiff is entitled to a decree, with a declaration that the title has been accepted, or if a reference is directed, with a reference subject to the conditions of sale.

Dickinson, Q.C., and *Rodwell*, for the defendant: No objection was made to the plaintiff's title in the first instance, for the defendant was not aware of any until December, 1873, but if the abstract furnished had been complete, and had contained abstracts of the conveyances to Mountford, the defect in the plaintiff's title would have been discovered.

The title was only accepted in the belief that Mountford died seised in fee of the lands in the first schedule, and that a statutory declaration could be furnished that he was at his death in possession of the rents and profits as owner thereof. This was not the case, though the correspondence shows that the vendor's solicitor was able to give full information as to the award.

There was, in fact, a common mistake, and the vendor is not *entitled to rely upon condition 4. Restrictive [787 conditions have always been strictly construed. The case of *Spratt* v. *Jeffery* (1), cited by the other side, was disapproved of in *Shepherd* v. *Keatley* (2), and in *Darlington* v. *Hamilton* (3), a suit for specific performance of a contract for the sale of leaseholds where there was a condition that the purchaser should not require proof or production of the lessor's title, Vice Chancellor Wood said: "It is quite clear, according to the doctrine referred to and confirmed in *Warren* v. *Richardson* (4) and *Shepherd* v. *Keatley*, that whatever may be the terms of the condition of sale, if the purchaser obtain information *aliunde* that the title of the vendor is not clear and distinct, he has a right to insist upon the objection." Again, in *Harnett* v. *Baker* (5), Vice-Chancellor Malins says, in commenting on the cases, "In the case of *Spratt* v. *Jeffery* it was held that a stipulation precluding the purchaser from inquiring into the lessor's title was valid. That was afterwards thought to be unreasonable, and therefore, in the cases of *Shepherd* v. *Keatley* and *Warren* v. *Richardson* it was decided, and it is now finally settled as a rule of law, that although there be a stipulation

(1) 10 B. & C., 249.
(2) 1 C. M. & R., 117.
(3) Kay, 550, 558.
(4) You., 1.
(5) Law Rep., 20 Eq., 50, 55.

that the title of the lessor is not to be shown, although there may be any stipulation that a certain fact is not to be required to be shown, if it turns out in the first case that the lessor's title is bad, and, in the second case, that the statement of the fact is erroneous, the purchaser may take advantage of the error, and although he is *prima facie* bound by the conditions, in the result he is not bound at all."

The same principles governed the judgment of the Court of Queen's Bench in *Waddell* v. *Wolfe* (1).

But the condition in this case is not in its terms wide enough for the plaintiff's contention; it is not a condition which binds him to accept such title as the vendor has, though that is the extent to which the plaintiff desires to go.

The argument that a man must know his own title, and in the absence of fraud may be compelled to buy his own property and estopped from saying it is his, is untenable on
788] principle; and *there is, moreover, direct authority against it. In *Bingham* v. *Bingham* (2), where the sale of an estate by the defendant to the plaintiff was completed and the purchase-money paid, the bill was to have the money refunded, as it appeared to have been the plaintiff's estate; and although it was insisted that it was the plaintiff's own fault, as the title had been produced, and he had had time to consider it, yet it was decreed for the plaintiff with costs and interest; "for though no fraud appeared, and the defendant apprehended he had a right, yet there was a plain mistake, such as the court was warranted to relieve against, and not to suffer the defendant to run away with the money in consideration of the sale of an estate to which he had no right."

Then, as to compensation, the plaintiff offers to substitute a small piece of land which we do not want for that which was our inducement for entering into the contract.

The bill ought either to be dismissed or an inquiry directed whether Mountford was in fact seised in fee of the lands in question.

Morgan, in reply: The authorities upon conditions restrictive of a purchaser's right to investigate a vendor's title are divisible into two classes, first, cases in which the conditions of sale preclude the purchaser from making requisitions upon the vendor as to his title, such as *Shepherd* v. *Keatley* (3); and secondly, cases in which they go further, and preclude him even from making investigation *aliunde*

(1) Law Rep., 9 Q. B., 515. (2) 1 Ves. Sen., 126. (3) 1 C. M. & R., 117.

as to the vendor's title—such as *Spratt* v. *Jeffery* (1) and *Hume* v. *Bentley* (2). Here the condition is that the purchaser "shall not investigate or make any objection in respect of" the title; and it falls within the latter class of authorities.

HALL, V.C.: This is a case of a different kind from those which have been cited, and the conclusion at which I have arrived is that the plaintiff is not, under all the circumstances, entitled to a declaration that she can make a title, but that she is entitled to have an *inquiry as to [789 title. The plaintiff had entered into a contract containing the usual stipulations as to making objections within a specified time, and it was clear that there was, or must be taken to have been, an acceptance of the title. As regards the not furnishing a statutory declaration of the ownership of Mr. Mountford, it appears to me that the plaintiff is right, because the declaration was only to be given if required, and in point of fact no requisition was ever made for such declaration, the only declaration required having been that as to the heirship of the vendor to Mr. Mountford, which was furnished, and nothing more remained to be done. The defendant, it is to be observed, had purchased the property in question in order to sell it again as part of a larger estate; and there was great delay on his part in the completion of the purchase. The plaintiff was meanwhile extremely indulgent in allowing the matter to stand over; and it was only by accident that, more than two years after the date of the contract, the defect in the title came out. It was, moreover, through the indulgence of the plaintiff that the discovery was made, for she, though not bound so to do, yet, apprehending no difficulty, produced to the sub-purchaser's solicitor documents in the possession of her solicitor, which gave rise to the objection; for in fact it was the sub-purchaser and not the purchaser who first raised the point. Then this difficulty having arisen, and the purchase being not yet completed, the purchaser's solicitor said, "We have been proceeding under a mistake; you have not got the property you profess to sell. You have sold as freehold what really is leasehold, and as your own what really is mine, subject perhaps to a lease to which you are entitled." Under the circumstances it appears to me that, quite irrespective of the letter of the 24th of December, 1873, written by the defendant's solicitor, the court is not justified in ordering specific performance of this contract, but that there is quite enough to justify it in directing a further investigation as

(1) 10 B. & C., 249.

(2) 5 De G. & Sm., 520, 525.

to the title to the property comprised in it. The plaintiff clearly admits an error with regard to part of the property which she sold as leasehold and which turns out to be freehold, and this can only be accounted for by supposing (and there is enough, I think, to show it was so) that the two properties were included in one title, and that the two
790] abstracted leases were *probably derived under the same title. I cannot, in this state of the evidence, refuse the purchaser some inquiry, representing, as he does, that part of the property which he purchased was really his own. On each side, therefore, there seems to be a case for inquiry, unless by the terms of the contract itself, and according to the law on the subject, inquiry is shut out both for vendor and purchaser.

It has been said that even if it is made out that the purchaser has bought his own property, yet that, having regard to the terms of the contract and the law, he ought to be compelled to complete his purchase and pay for that which is his own. The cases are divisible into two classes: first, cases in which the terms of the contract preclude the purchaser from making requisitions upon the vendor as to his title; and, secondly, cases in which they preclude him not only from making inquiries from the vendor as to his title, but from making any investigation anywhere about the title. A condition of the latter class is no doubt valid, but the court has never yet gone so far as to hold that such a condition precludes a purchaser from saying to the vendor, at any rate before the completion of the contract, "We have both been proceeding under a common mistake. You said the property was yours, but I now find by some document which I have seen that it is mine, and the contract which you are asking me to complete is one without consideration, for I shall be paying the purchase-money and getting nothing for it." The condition has never been construed to include such a case as that. And where there has been such a common mistake, and there is no fraud, the court will not, in a suit for specific performance, compel the purchaser to complete such a contract.

The case of *Bingham* v. *Bingham* (1), which was referred to on behalf of the defendant, carries the matter further, unless the decision there depended upon fraud, as to which I shall say more. That case is an authority to the effect that, under circumstances like the present, even if the contract had been completed and the purchase-money paid, the purchaser might come to the court, and saying, "I have paid

(1) 1 Ves. Sen., 126.

for what was my own," compel the vendor to refund the money. That case is good law and has not been questioned, *and I may refer to the observations upon it which [791 have been made in several editions of Sugden's Vendors and Purchasers. In the tenth edition the case will be found referred to with a long statement taken from the registrar's book, and it would seem that the case had not been consided as one of fraud. There was, it is true, misrepresentation on the part of the defendant as to the state of the title, to the effect that a will devising the estate to the plaintiff was invalid, the defendant insisting that the testator had no power to make such devise, but that if he had, the plaintiff should have been better advised before he parted with his money. But there was no fraud, and nothing beyond this misstatement of the legal effect of an instrument. The case is referred to as an authority for the general proposition contended for by the defendant, and though in some editions Lord St. Leonards has thrown out doubts whether it would apply in the absence of the element of fraud, in the last edition he definitely stated the case as an authority for the proposition under circumstances in which "no fraud appeared" (1); and the case has been recognized as an authority applicable to cases where there has been no fraud. In *Saunders* v. *Lord Annesley* (2), referred to by Lord St. Leonards on the same page, Lord Redesdale expressed a doubt whether equity would interfere in a similar case in the absence of fraud. He says: "In a case of fraud it certainly might; in a case of mere ignorance, although I incline to think it might, yet after looking a little into the subject, I find great difficulty in holding that a court of equity could interfere." But more recently, in *Cochrane* v. *Willis* (3), the Master of the Rolls in the court below, and Lord Justice Turner in the Court of Appeal (4), treated *Bingham* v. *Bingham* (5) as an authority in a case of mistake as distinguished from one of fraud. *Bingham* v. *Bingham* was decided by Fortescue, M.R., sitting for Lord Hardwicke. I may also refer upon this point to what was said by two learned judges, Lords Cranworth and Westbury, in *Cooper* v. *Phibbs* (6). Lord Cranworth says (7): "The consequence was, that the present appellant, when, *after the death of his uncle, he entered into the [792 agreement to take a lease of this property, entered into an agreement to take a lease of what was, in truth, his own

(1) Sug. V. & P., 14th ed., p. 245.
(2) 2 Sch. & Lef., 101.
(3) 34 Beav., 368; Law Rep., 1 Ch., 58.
(4) Law Rep., 1 Ch., 64.
(5) 1 Ves. Sen., 126.
(6) Law Rep., 2 H. L., 149.
(7) Law Rep., 2 H. L., 164.

property; for, in truth, this fishery was bound by the covenant, and belonged to him, just as much as did the lands of Ballysadare; therefore, he says, I entered into the argreement under a common mistake, and I am entitled to be relieved from the consequence of it. In support of that proposition he relied upon a case which was decided in the time of Lord Hardwicke, not by Lord Hardwicke himself, but by the then Master of the Rolls, *Bingham* v. *Bingham* (1), where that relief was expressly administered. I believe that the doctrine there acted upon was perfectly correct doctrine, but even if it had not been, that will not at all show that this appellant is not entitled to this relief, because in this case the appellant was led into the mistake by the misinformation given to him by his uncle, who is now represented by the respondents."

Nothing can be clearer than than this, that Lord Cranworth recognized the principle that the court would, even in the case of a completed contract, give relief against a common mistake in the same way as it would against fraud. And Lord Westbury says (2): "It is said '*Ignorantia juris haud excusat*, but in that maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake. Now, that was the case with these parties—the respondents believed themselves to be entitled to the property, the petitioner believed that he was a stranger to it, the mistake is discovered, and the agreement cannot stand."

It appears to me that the principle is thus rightly laid down by Lord Westbury, and that it applies to the case of an existing contract in a case where the court is asked to make a decree for specific performance. I am, therefore, of opin-
793] ion that in this case *an inquiry must be directed whether the hereditaments comprised in the first schedule of the contract for the purchase did or did not at the date of the contract, and do or do not belong absolutely to the defendant, subject only to a term granted by a lease dated in the year 1781, a few years only of which remain unexpired. The affirmative of that it will be for the defendant to make out. If he fails to do so there will be a decree for specific

(1) 1 Ves. Sen., 127. (2) Law Rep., 2 H. L., 170.

performance of the contract with all the consequences, and the defendant will have to pay all the costs of the suit. Supposing, on the other hand, it should be ascertained that a title cannot be made, the case will come on again for further consideration, when the costs will remain to be disposed of. If both parties desire it, I will state how I think the case will then be dealt with.

Dickinson, Q.C., and *Morgan*, Q.C., having consented,

HIS LORDSHIP said: In case the defendant should make out the affirmative, I think the case will not be one for specific performance with compensation, I shall then only dismiss the bill, and dismiss it without costs.

Solicitors for plaintiff: *G. Cart*, agent for E. M. Jones, Welchpool; *Fortune*, agent for Winnett & Son.

[3 Chancery Division, 795.]

C.J.B., June 19, 1876.

**In re* FAWCUS. *Ex parte* BUCK. [795

Reputed Ownership—Order and Disposition—Factor—Lien—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 15.

S., who had for many years traded as a timber merchant in his own name, entered into an agreement with F. & Co., who were also timber merchants, to carry on his business thenceforth as their agent at a remuneration by way of a share of profits. The business was thenceforth carried on under this agreement, but in the name of S. as before. S. dealt with the timber in his possession as if he were the absolute owner of it (except as between himself and F. & Co.), and there was nothing done to inform the outside world of the change which had taken place. In the course of the business F. & Co. drew bills on S., which he accepted in his own name to be protected by F. & Co. Both F. & Co. and afterwards S. filed liquidation petitions.

Before S.'s liquidation, F. & Co.'s trustee demanded the timber in his hands, which was refused:

Held, that to the extent of the current bills S.'s estate had a lien on the timber.

Semble, the reputed ownership clause applies to goods in the hands of a factor, unless the relation of principal and factor is notorious.

THIS was an appeal from a decision of the judge of the Sunderland County Court.

For some years prior to 1870 James Stephenson carried on business as a timber merchant at Sunderland, on premises belonging to the River Wear Commissioners, under the firm of James Stephenson & Co. In 1870 he entered into an agreement with Messrs. T. P. Fawcus & R. Lucas, who were timber merchants at West Hartlepool, to carry on his business thenceforth for them, and as their agent. The business was thenceforth carried on by him under that arrangement, but under the old firm of James Stephenson & Co., until

January, 1874, when T. P. Fawcus & Lucas dissolved partnership, and T. P. Fawcus entered into partnership with Robert Craggs, and they thenceforth carried on the business of timber merchants at West Hartlepool under the firm of Fawcus, Craggs & Co. On the 5th of January, 1874, an agreement was entered into between them and Stephenson, similar in its terms to the agreement between him and Fawcus & Lucas, and in substitution for that agreement.

The agreement of the 5th of January, 1874, contained a 796] recital *that T. P. Fawcus & Craggs were carrying on business as timber merchants at Sunderland under the firm of James Stephenson & Co., which business, under the same firm, had been carried on formerly by Stephenson, and lately by Fawcus & Lucas, and that Fawcus & Craggs had agreed to retain and employ Stephenson as manager of the business upon the terms and conditions thereinafter expressed. The agreement contained the following stipulations (*inter alia*):—

1. That Fawcus & Craggs should, until the determination of the agreement as thereinafter provided, retain and employ Stephenson as their agent, but in the name of the firm of James Stephenson & Co., to manage the business so carried on as aforesaid, and that Stephenson should, during such time as aforesaid, serve Fawcus & Craggs as such manager according to the terms and conditions therein expressed.

2. That Fawcus & Craggs might at any time at will remove from the premises at Sunderland any goods for the time being remaining unsold which they might have intrusted to Stephenson for sale or otherwise authorized him to sell.

3. That until the determination of the agreement Stephenson should not engage or enter into any trade or business on his own account, but should diligently employ himself as such agent in the conduct and management of such business as Fawcus & Craggs should intrust to him; that he should not, until the determination of the agreement, buy any timber as such agent, except of the firm of Fawcus, Craggs & Co., or with the express sanction in each case of Fawcus & Craggs.

4. That until the determination of the agreement Stephenson should not accept any bill of exchange or make or sign any promissory note on account of or in relation to the said business except at the request of Fawcus & Craggs.

5. That Stephenson should on request accept the drafts of Fawcus & Craggs for the value of any stock belonging to them for the time being remaining in the premises at Sun-

derland, Fawcus & Craggs jointly and severally undertaking to protect any such acceptances at maturity.

6. That Stephenson should keep all proper books of account of all goods intrusted to him for sale, and of all sales effected by him *as such agent, and from time to [797 time hand over to Fawcus & Craggs all bills of exchange and promissory notes, and all cash and checks that might be received by him in the course of business immediately after the same should be received, or at such stated periods as Fawcus & Craggs might from time to time determine.

Clause 9 provided that Stephenson should be remunerated for his services as agent by a share of the profits of the business, varying with the amount of the profits.

Clause 10 provided that, in the event of there being a loss, Stephenson should pay a third part of it.

Clause 12 provided that the agreement might be determined at any time by six months' notice on either side, and that, upon the expiration of the notice, Fawcus & Craggs should transfer the business premises at Sunderland, or their interest therein, to Stephenson, and from the date of such transfer Stephenson was to be solely liable for all rent and other outgoings in respect of the premises, and all debts due to the firm in respect of the business were to be recovered by Fawcus & Craggs in the name of Stephenson, or in their own name, and they were to have the power of using his name as might be necessary for the purpose.

Clause 13 contained a declaration that no partnership was intended to be created between Fawcus & Craggs on the one hand, and Stephenson on the other hand, but that the whole of the business intended to be carried on under the agreement was to be the business of Fawcus & Craggs, and was to be carried on by Stephenson under and subject to their orders and directions.

From the time of the agreement of 1870 the business was carried on by Stephenson under his old firm of James Stephenson & Co., just as before, no notice having been given to outside creditors of any change. Part of the business premises continued to be occupied by Stephenson in his own name, and the remainder of the premises was assigned by him to Fawcus & Lucas, and afterwards by them to Fawcus & Craggs.

In the course of the business large quantities of timber were forwarded by Fawcus, Craggs & Co. to Stephenson for sale, and were stored partly on the premises occupied by him in his own name, and partly on the premises rented by

Fawcus & Craggs, part being left floating in the dock, and 798] entered in the books of *the commissioners as belonging to James Stephenson & Co., and all this timber Stephenson, under the firm of James Stephenson & Co., dealt with as the absolute owner, accounting, however, to Fawcus, Craggs & Co., under the terms of the agreement. They drew bills on James Stephenson & Co., which Stephenson accepted in the name of that firm, and these bills were discounted by Fawcus. Craggs & Co. The amount of these drafts was always, in fact, less than the value of the timber held by Stephenson for sale under the agreement, but there was no other stipulation with regard to the bills than that which was contained in the agreement.

On the 31st of May, 1875, Fawcus & Craggs filed a liquidation petition, in which they described themselves as trading at West Hartlepool under the firm of Fawcus, Craggs & Co., and at Sunderland under the firm of James Stephenson & Co. On the 2d of June, C. S. Lane was appointed receiver under this petition, and on the 21st of June the creditors resolved upon a liquidation by arrangement, and appointed Lane trustee of the debtors' property. On the 1st of June Lane (before his actual formal appointment as receiver) went to Sunderland, and demanded of Stephenson possession of the timber which was in his possession as agent for Fawcus, Craggs & Co. Stephenson refused to give up possession, on the ground that he claimed to be entitled to a lien on the timber to secure him against liability on his accptances pursuant to his arrangements with Fawcus, Craggs & Co. At this time there were current bills to the amount of £5,832, which Stephenson had accepted for Fawcus, Craggs & Co. Three of those bills had been drawn by them, and the remainder had been drawn by their direction by another firm of Fawcus, Fawcus & Co. Stephenson also alleged that a sum of £1,232 was due to him by Fawcus, Craggs & Co., in respect of his share of the profits of the business. Ultimately it was arranged that Stephenson should retain possession of the timber on behalf of Lane as receiver, but without prejudice to any right of lien to which he might be entitled.

After this Stephenson continued in possession of the timber, and dealt with it just as before, furnishing, however, an account to Lane. Soon afterwards Stephenson was served with a debtor's summons at the instance of the holders of one of his acceptances on behalf of Fawcus, Craggs & Co., 799] and on the 22d of June, 1875, *he filed a liquidation petition, under which Robert Buck was appointed receiver,

and he at once took possession of the timber then in the possession of Stephenson. On the 9th of July the creditors resolved on a liquidation by arrangement, and appointed Buck trustee. By arrangement between him and Lane the timber was sold, and the proceeds of sale, amounting to £8,000, were paid into a bank in the joint names of Buck and Lane. On the 1st of March, 1876, Buck gave notice of an application to the county court for an order declaring that the £8,000 belonged to him as the trustee of Stephenson.

Henry Fawcus, one of the partners in the firm of Fawcus, Fawcus & Co., deposed that they agreed to draw the bills which they had drawn on James Stephenson & Co. upon the express understanding that the latter firm held timber to a greater value than the amount of the bills, which timber they could, in case of need, hypothecate to pay the bills.

This was denied by Craggs.

The judge made an order declaring that the £8,000 was the property of Lane, as trustee of Fawcus & Craggs.

Buck appealed. On the hearing of the appeal, some further affidavits, filed on behalf of Lane, were allowed to be read, with the view of showing that it was notorious in the timber trade at Sunderland that the business of James Stephenson & Co. belonged in fact to Fawcus, Craggs & Co., and that it was carried on by Stephenson only as agent or factor for them.

Roxburgh, Q.C., and *W. S. Owen*, for the appellant: Stephenson was entitled to a factor's lien on the timber in his possession for the amount of his acceptances on behalf of Fawcus & Craggs: *In re Pavy's Patent Felted Fabric Company* (1). But, more than that, we contend that the timber which was in Stephenson's possession at the commencement of his liquidation passed to his trustee under the reputed ownership clause: Bankruptcy Act, 1868, sect. 15; *Ex parte Watkins* (2). The county court judge relied on *Ex parte Boden* (3) as an authority that the reputed ownership clause does not apply to goods of a principal in the *possession of a factor. But in that case the evi- [800
dence showed that the bankrupt's dealing as a factor was notorious, whereas here it was kept secret. He always dealt with the timber as absolute owner.

De Gex, Q.C., and *T. Witt*, for the trustee of Fawcus & Craggs: This is simply the case of the same persons carrying on business in two places under distinct firms. They

(1) 1 Ch. D., 631.
(2) Law Rep., 8 Ch., 520, 528.
(3) 28 L. T. (N.S.), 174.

were drawing bills upon themselves, and no action could have been maintained on the bills. Any equity to have the timber specifically applied to meet the bills could be maintained only by the holders of the bills, and they have not asserted any such right. But even they could not support such a claim, because, according to the terms of the agreement, Fawcus & Craggs could remove the timber at any time. The agreement is altogether inconsistent with the existence of any lien: *Bock* v. *Gorissen* (1). *In re Pavy's Patent Felted Fabric Company* (2) was a different case. As to the doctrine of reputed ownership, it has long been settled that property of a principal in the hands of a factor is exempt from its operation. And it makes no difference whether the bankrupt's dealing as a factor is notorious or not: *Ex parte Moldaut* (3); *In re Kullberg* (4). The decision in *Ex parte Boden* (5) did not depend upon notoriety. Moreever, in the present case the consent of the true owner was determined when Lane demanded possession on the 1st of June, and that is enough to prevent the operation of the reputed ownership clause: *Ex parte Ward* (6); *Ex parte Montagu* (7).

Bacon, C.J.: Where the fact of the relation of principal and factor is clearly established, there is no doubt that the order and disposition clause does not apply. In *Ex parte Boden*, which was referred to by the learned judge of the county court, the report shows that there was evidence that it was notorious in the neighborhood that the bankrupt was in the habit of selling stone on commission, and his 801] *books clearly showed that he was only acting as Boden's factor in such sales. These facts are wholly wanting in the present case. Stephenson, having carried on business as a separate and independent trader for years, entered into this agreement in January, 1874, that he should become the factor and agent of Fawcus & Craggs. That agreement was kept entirely to themselves. There is no pretence for saying that it was notorious, or that Stephenson ever changed his character and reputation as an independent seller of timber. He had a name, a commercial name, and this name was never changed. But, for some reason which the respondent has not attempted to explain, Fawcus & Craggs set up an imaginary firm, and called themselves by the name of Stephenson & Co., carrying on

(1) 2 D. F. & J., 434.
(2) 1 Ch. D., 631.
(3) 3 Dea. & Ch., 351.
(4) 9 L. T. (N.S.), 460.
(5) 28 L. T. (N.S.), 174.
(6) Law Rep., 8 Ch., 144.
(7) 1 Ch. D., 554.

Stephenson's business, not in their own name but in the name which he had used before. In what honesty could any such agreement have been come to? I have tried to find out some meaning for it, but I can find none. Stephenson's reputation in his trade may have made it advisable for them to employ him as their agent. But were the public to be deceived by this imaginary firm? Why were Fawcus & Craggs to carry on their trade under another man's name, and then, when they became bankrupt, to say to that other man's creditors that the debts contracted by means of that contrivance were not to be paid? For that is what they really say. Lengthened arguments have been addressed to me upon the agreement; it has been specially pleaded and picked to pieces. Two clauses are taken out of it as being very important, and others are put aside as not having any bearing upon the matter. Because there is a stipulation that the owners of the goods might at any time, notwithstanding the employment of Stephenson (who had a right to withdraw from the agency at will), remove the goods remaining unsold, therefore it is said that his lien as factor (which he was as between himself and them) shall not prevail. There is no kind of sense or reason in any such suggestion. That the goods were in Stephenson's order and disposition at the commencement of his liquidation, is a fact proved, at least to my satisfaction, and a jury could not hesitate about it for one moment. In his name, by his personal exertions, the trade which he has for years carried on is continued without change or notice of any sort, and he becomes bankrupt, being in possession of these *goods. It is said that Fawcus & Craggs were the [802 true owners of the goods, and I quite agree that they were. But it is equally clear that, with their full consent, Stephenson was held out to the public as the real owner of the goods; it was not a mere accidental remaining in his possession; and, unless I am to disregard the evidence of Henry Fawcus, his firm of Fawcus & Fawcus, when they agreed to draw bills for Fawcus & Craggs upon Stephenson, were told by Fawcus & Craggs, "The bills are perfectly good bills; Mr. Stephenson holds timber perfectly sufficient to satisfy this demand, or any other." I think that, so far as any creditor of Stephenson is concerned, the operation of the reputed ownership clause is not in the slightest degree affected by the relation of principal and factor between himself and Fawcus & Craggs. Then it is said that Mr. Lane made such a demand for the timber as to put an end to the consent of the true owner. But what right had Mr. Lane to do this?

He had no more right to do it than I should have had. He, the prospective receiver under Fawcus & Craggs' petition, said to Stephenson, "I desire to have possession of these goods." How was that met? Stephenson said then, as his trustee says now, "You are not entitled to the goods, because, factor or no factor, I have a lien on them. I have incurred liabilities for you, and debts are due to me from you, and there are £5,000 worth of bills outstanding, the funds for the payment of which are to be derived from these goods." Was that demand for possession made by a person entitled to make it, or was it made under such circumstances as would put an end to the notorious fact that the goods were in the order and disposition of Stephenson? I think it would be at variance with every principle of law so to hold. What then took place? Lane, finding that his demand would not be complied with, came to an agreement, prudent enough in itself, that the goods should remain in the possession of Stephenson, that the trade should be carried on by him, and that things should go on just as before. There the matter ended. What took place afterwards cannot in the slightest degree affect the judgment now to be pronounced. It is undisputed that the £8,000 are the proceeds of these goods, and that there are £5,000 worth of outstanding bills, some of which have been proved, and all of which are provable, against Stephenson's estate. According
803] to *the agreement (which must be read as an entire thing, and not by scraps), the payment of these bills was to be made by the persons on whose behalf they were accepted, and not by Stephenson. It is said now that Stepenson's creditors, or the funds in which they are interested, are to be made liable for these bills, while the means of paying them are to be taken away. It would require a very strong case, in fact, in law, and in honesty, before I could adopt any such view.

What ought to be done is this: An account must be taken of the bills which were accepted by Stephenson after the date of the agreement, and which still remain unpaid. It must be declared that Stephenson's estate is entitled to be indemnified out of the proceeds of the timber to that extent, and that, to whatever extent there may be a debt between Fawcus & Craggs and Stephenson, he is entitled to a lien on the proceeds of the timber.

Solicitors for appellant: *Maples, Teesdale & Co.*, agents for Thomas Steel, Sunderland.

Solicitors for respondent: *Shum, Crossman & Crossman*, agents for Ralph Bell, West Hartlepool.

[3 Chancery Division, 803.]

C.J.B., July 24, 1876.

In re CUMBERLAND. *Ex parte* WORTHINGTON.

Proof—Invoice Price of Goods—Discount to be allowed for Cash Payment—Composition—Admission by Debtor of Amount of a Debt.

Wholesale traders supplied goods to a retail dealer on the terms that he was to be allowed a discount of 20 per cent. from the invoice prices on payment in cash within a month :

Held (reversing the decision of the county court judge), that, cash payments not having been made, proof must be admitted in the bankruptcy of the retail dealer for the full amount of the invoice prices of the goods.

Ex parte Pigou (1) not followed.

Semble, that a compounding debtor, who allows a creditor to prove without objection at one of the creditors' meetings for a certain sum, cannot afterwards be heard to dispute that that sum is due to the creditor.

THIS was an appeal from a decision of the judge of the Bradford County Court.

*W. S. Cumberland, an ale and porter merchant [804 at Bradford, filed a liquidation petition on the 16th of December, 1875. The creditors resolved to accept a composition of 10*s.* in the pound. Messrs. Worthington & Co., brewers at Burton-on-Trent, at the first meeting of creditors, proved for £791 2*s.* 9*d.*, which they stated to be due to them for ale sold and delivered to the debtor, and for casks not returned. This proof was not then objected to, and they voted in respect of it. The affidavit of proof stated that Worthington & Co. had no security for the debt, except three bills of exchange drawn by them and accepted by the debtor. These bills were for the respective sums of £150, £149 15*s.* 2*d.*, and £100, and they respectively fell due on the 14th of December, 1875; the 14th of January, 1876; and the 14th of February, 1876. They were all dishonored at maturity. In March, 1876, the trustee appointed under the composition gave notice that he rejected the proof to the extent of £250 1*s.* 7*d.* His reasons for doing so were two : 1. That the bills in question were accepted by the debtor as cash payments on account of the sums which he then owed to Worthington & Co., and for the purpose of entitling him to a discount to which, according to the course of business, he was entitled for cash payment, and that, notwithstanding the dishonor of the bills, Worthington & Co. were not entitled to prove for the original amount of the debt. 2. That credit had not been given for certain casks returned. Worthington & Co. applied to the court to reverse the decision

(1) 3 Madd., 136.

of the trustee, and to enforce the payment of the composition. They deposed that the terms upon which they dealt with the debtor were that he was to be allowed a discount of 20 per cent. from the invoice price of all ale sold to him by them on payment by him in cash in one month from the first day of the month following the delivery of the ale, and that the three acceptances were received by them from him because it was not convenient for him to make the monthly payments in cash. They admitted that in calculating the amount of those bills they made him the allowance of 20 per cent., but only on the supposition that the acceptances would be paid at maturity.

Upon the hearing by the judge it was agreed that the proof should be reduced by £88 15*s.* 3*d.*, the value of certain casks which had been returned to Worthington & Co., 805] and it was ordered *that the proof should be still further reduced by £138 19*s.* 3*d.* (the aggregate amount allowed by Worthington & Co. to the debtor in respect of discount on their receiving from him the three acceptances already mentioned and two other acceptances), the court being of opinion that the debtor was entitled to the benefit of the discounts, notwithstanding the dishonoring of the three acceptances, the discounts being, in the opinion of the court, trade and not cash discounts, and discounts to which the debtor would be entitled in any event. From this order Worthington & Co. appealed so far as it disallowed the £138 19*s.* 3*d.*

Winslow, Q.C., and *C. Gould*, for the appellants: The evidence is clear that this discount was only to be allowed in the event of cash payment being made. Acceptances which are afterwards dishonored are not cash payment. Moreover, the debtor, having allowed a composition to be accepted by the creditors on the faith of a certain sum being due to Worthington & Co., is bound by that admission. Though the other creditors might perhaps be able to dispute the amount of the debt, the debtor himself cannot.

Safford, for the trustee: The acceptances were taken by the appellants as cash. That in a case like this proof in bankruptcy can only be admitted for the invoice prices of the goods less the discount, is shown by *Ex parte Aynsworth* (1); *Ex parte Pigou* (2).

Bacon, C.J.: I cannot go into the question of the difference between trade and cash discounts. In the affidavits I find that only one discount is mentioned. I find this uncontradicted, that the mode of trading between the parties

(1) 4 Ves., 678. (2) 3 Madd., 136.

was this, that if the debtor made payment within a month for the goods supplied to him by the appellants he should be allowed a discount of 20 per cent. Well, then, the parties carried on their business on this footing, and accounts were rendered from time to time in which credit was *given [806 for the discount, and the debtor accepted bills of exchange for the amounts due after deducting the discount. But if I owe a man a sum of money and give him a bill of exchange for the amount, I do not satisfy the debt unless I pay the bill of exchange at maturity. If I fail to pay the bill of exchange and he sues me for the full amount, it cannot be said that I have paid him the money because I gave him a bill of exchange for it. It is true that in this case the debtor gave bills of exchange in payment, but, being dishonored, they became worthless pieces of paper, and the debt was not paid at all. He failed to pay, and the fact that bills of exchange were given cannot make the case any stronger, and I may deal with it as if there had been no such bills. I cannot understand upon what ground the debt can now be disputed, it having been admitted to proof at the meeting for the full amount, and the debtor, when he saw a claim put forward in competition with other creditors for a larger amount than he intended to admit, should at once have objected to it, as it was upon the assumption of a certain total amount of debts being due that the creditors agreed to accept the composition. Upon the facts and evidence before me I decide that the appellants were entitled to bring an action for the full amount of their claim, and that the debtor could not have insisted upon the discount, because he had not paid for the goods in cash according to his agreement. He could not have pleaded that he had given bills of exchange in payment, because the bills were dishonored at maturity. The appellants are entitled to be paid the composition on the full amount of their debt.

Solicitors for appellants: *Dobinson, Geare & Son*, agents for J. & W. J. Drewry, Burton-on-Trent.

Solicitors for trustee: *Layton & Jaques*, agents for A. Neill, Bradford.

[3 Chancery Division, 807.]

C.J.B., Aug. 7, 1876.

807] *In ré* PEARSON. *Ex parte* STEPHENS.

Voluntary Settlement—Life Estate reserved to Settlor determinable on Bankruptcy—13 Eliz. c. 5.

In 1858 a man, who was not then engaged in trade, and who owed no debts, made a voluntary settlement of a sum of £1,000. The trusts of the deed were, a life estate to himself determinable on bankruptcy, then a life estate to his wife for her separate use, then trusts for the children of the marriage, and an ultimate remainder to the settlor. In 1873 he for the first time engaged in trade. In 1875 he was adjudicated a bankrupt:

Held, that the settlement was void *in toto* as against the trustee in the bankruptcy.

THIS was an appeal from a decision of the Registrar of the Tunbridge Wells County Court, acting as judge.

On the 6th of January, 1858, an indenture was executed between John Pearson of the one part, and Edward Hodge and Henry Hodge of the other part, by which, after a recital that John Pearson had recently come into possession under the will of his father of (amongst other things) the sum of £1,000, and, being free from debts and liabilities, was desirous of settling the same for the benefit of himself and his wife and family in manner thereinafter appearing, and that the £1,000 had been paid over by Pearson to Edward Hodge and Henry Hodge, it was witnessed that, in consideration of the natural love and affection which Pearson bore towards his wife and children, it was declared and agreed that Edward Hodge and Henry Hodge, their executors, administrators, and assigns, should stand possessed of the £1,000, upon trust to invest the same as therein mentioned, and to pay the income to Pearson until he should assign, charge, or otherwise dispose of the same by way of anticipation, or until he should be found or declared a bankrupt, or become an insolvent debtor within the meaning of some act of Parliament for the relief of insolvent debtors, or until he should do any other act, or any other event should occur, whereby the same income, if payable to himself, would become vested in some other person or persons, or until his death, which should first happen. But if Pearson should assign, charge, or otherwise dispose of the same income by
808] way of anticipation, or *should become or be declared a bankrupt, or become an insolvent debtor within the meaning of some act of Parliament for the relief of insolvent debtors, or if he should do some other act, or any other event should happen whereby the same income, if pay-

able to himself, would become vested in some other person or persons, then upon trust that the trustees or trustee should thenceforth pay the income unto Elizabeth, the then present wife of John Pearson, for her life, for her separate use without power of anticipation. And, subject to these trusts, the whole of the trust fund was to be in trust as therein mentioned for the children or remoter issue of John Pearson and Elizabeth his wife, as they, or the survivor of them, should appoint, and in default of oppointment for the children who should attain twenty-one or marry, in equal shares. The ultimate limitations were, in case John Pearson should survive his wife, upon trust for him absolutely, and, in case he should die in her lifetime, upon such trusts as he should by deed or will appoint, and in default of appointment for his next of kin, according to the Statute of Distributions, excluding the wife.

John Pearson was not a trader at the date of the execution of the settlement. He did not commence to trade until the beginning of the year 1873, when he became a tenant of a public house, and engaged in the business of a licensed victualler. On the 13th of December, 1875, he was adjudicated a bankrupt. At this time the wife was dead, but there were two children of the marriage living, who were under the age of twenty-one. The trustee in the bankruptcy applied to the court for an order declaring the settlement void as against the creditors. There was no evidence to show that Pearson was insolvent at the date of the execution of the deed: in fact it was admitted that he owed no debts at that time. The Registrar dismissed the application. The trustee appealed.

Doria, and *E. C. Willis*, for the appellant: The limitation over of the bankrupt's life estate in the event of his bankruptcy is at any rate void as against creditors: *Lockyer* v. *Savage* (1); *Higinbotham* v. *Holme* (2); *Ex parte Mackay* (3). But *we go further, and contend that this settlement [809 is void *in toto* as against creditors under the statute 13 Eliz. c. 5. At the time when it was executed no one but a trader could be made a bankrupt; therefore the limitation over in the event of bankruptcy shows that the settlor must have contemplated engaging in trade and becoming bankrupt. The object must have been to defeat creditors. Creditors who have become such since the date of the deed have a right to impeach it: *Spirett* v. *Willows* (4). Sect. 91 of the Bankruptcy Act, 1869, does not apply to this case.

(1) 2 Str., 947.
(2) 19 Ves., 88.
(3) Law Rep., 8 Ch., 643.
(4) 3 D. J. & S., 293.

Finlay Knight, and *E. Baldock Stone*, for the trustees of the settlement: As to the life estate of the bankrupt we submit the point to the court. But as to the remainder to the children, subject to the bankrupt's life estate, we contend that it is valid. There is nothing to show, as in *Freeman* v. *Pope* (1), that the settlement must necessarily have had the effect of defeating or delaying creditors. In *Crossley* v. *Elworthy* (2) the settlor was engaged in speculative transactions, and in *Mackay* v. *Douglas* (3) the settlor was about to engage in such transactions. In the present case there is nothing to show any intention of defeating or delaying creditors except the making the settlor's life estate determinable on bankruptcy. Though that limitation may be itself void as against creditors, there is no authority for saying that its insertion has the effect of making the settlement void *in toto*. Indeed, *Knight* v. *Browne* (4) is, so far as it goes, an authority to the contrary.

Bacon, C.J.: This deed is plainly fraudulent upon the face of it. What is the meaning of it? The settlor in effect says, "I have got £1,000; I do not intend my creditors to have a farthing of it; and to accomplish that purpose I will settle it in such a way that, if by any accident my creditors should hereafter have a claim to it, it shall go to some one else." That is as plainly fraudulent as possible. Sect. 810] *91 of the Bankruptcy Act has nothing to do with the case. Nor has the case of *Knight* v. *Browne* (4) any application, for it related to a marriage settlement. In the present case I think that the settlement is plainly fraudulent, for the law says that it is fraudulent for a man so to deal with his property as to disappoint the just claims of his creditors. The deed must be declared void, but the costs of all parties must be paid out of the fund.

Solicitor for appellant: *John Burton*, Serjeants' Inn and Tunbridge Wells.

Solicitors for respondents: *Collyer-Bristow*, *Withers & Russell*, agents for Stone & Simpson, Tunbridge Wells.

(1) Law Rep., 5 Ch., 538.
(2) Law Rep., 12 Eq., 158.
(3) Law Rep., 14 Eq., 106.
(4) 30 L. J. (Ch.), 649.

[3 Chancery Division, 812.]

V.C.B., March 16, 17: C.A., July 3, 4, 1876.

*Bradburn v. Morris. [812

[1874 B. 364.]

Morris v. Bradburn.

[1874 M. 143.]

Easement—Right of Way—Increase of Servitude—Agricultural User—Mining User—Use of Occupation Road—Change of Use—Present Use—Injunction.

User for twenty years of a way to a field used only for agricultural purposes does not give a right of way for mineral purposes.

The owner of a field, with a right of way to it through an occupation road agreed to sell the surface of the field (reserving the minerals). The field had never been used for mining, and the vendor did not appear to have any present intention of working the minerals:

Held, that the vendor, having had a right to use the road for agricultural purposes only, could not prevent the purchaser from so altering the road as to make it unfit for the use of the vendor in working the minerals under the land agreed to be sold:

Held, also, that even if the vendor had a right to use the road for minerals, inasmuch as he had no present intention of working the minerals, the court would not interfere.

Quære, per Mellish, L.J., whether, where an occupation road follows the boundary of two estates so as to afford a presumption of ownership *ad medium filum*, each owner has not the right to use the road for all purposes though the actual user has been only for limited purposes.

Decision of Bacon, V.C., reversed.

John Morris was the owner of a field near Wednesfield, in the county of Stafford, the only approach to which was by an occupation road. Morris had used the road for more than twenty years as a means of access to his field. The field had been used for agricultural purposes only, no mine having ever been opened upon it. The land on one side of the road was the property of the Duke of Cleveland, and part of the land on the other side had formerly belonged to Morris, and had been sold by him to Bradburn with a reservation of mines. It was alleged by Bradburn that the soil of the road belonged to the Duke of Cleveland, and Morris, in answer to interrogatories, said that he did not know whether it belonged to the Duke or to whom it belonged. He did not in his pleadings or evidence suggest that any part of the soil in the road had ever belonged to himself. The ownership *of the Duke was not formally proved, [813 but the Duke's agent made an affidavit stating that to the best of his belief the soil of the road was the Duke's property, except that a canal company claimed the property in a bridge by which the road crossed their canal. Bradburn

and one or two other persons had also for more than twenty years used the road as a means of access to land belonging to them for agricultural purposes. Some years before there seemed to have been a temporary user of the road for conveying minerals from lands occupied by the Duke's tenants, but this had been discontinued before the present dispute arose, and it was not alleged that any one had acquired a prescriptive right by user for mineral purposes. The only user of the road for any other purposes than those above stated was by Bradburn, who had been allowed by the Duke's agent to use it for the purposes of a manure manufactory belonging to him. Bradburn's works lay on the further side of the canal from Morris's field, and some time before the agreement Bradburn had been allowed by the Duke's agent to construct a branch railway along the road from his works to a station which was situated between Morris's field and the works. Bradburn had also purchased from the canal company the right to carry his railroad across their bridge. In constructing the railroad Bradburn had altered the levels of the road, making the gradients easier in some places and more severe in others. He had also, with the approval of the Duke's agent, widened the road by taking in an additional strip on the side on which the Duke's land lay, but across the canal bridge the width of the road remained unaltered, so that no traffic could pass over while Bradburn's trucks were on the bridge. While these works were in progress Morris had occasionally protested against Bradburn's interference with the road, and Bradburn had, at his instance, removed temporary obstructions which he had put upon it. The railroad and works were nearly or quite completed at considerable expense (with the exception of some new fences to the enlarged road and some improvements in its level which had been since made) when the question in these suits arose under the following circumstances: There was a pending action by Morris against Bradburn for fouling a stream to the injury of Morris's field, and at the trial, which came on upon the 13th of March, 814] *1873, the action was compromised by an agreement that Bradburn should buy either the surface only of Morris's field or the surface with the mines under it, and the mines reserved on the former sales by Morris to Bradburn. If Bradburn elected to buy the surface only (which he afterwards did), power was to be reserved to Morris to work the mines. The price was to be fixed by Mr. Hill, Q.C., who was also to settle the terms on which Morris was to work the mines. Mr. Hill awarded the price and settled a clause reserving to

Morris rights of way and surface user, and other facilities over the field for working the mines. During the discussion before the arbitrator Morris had claimed to have inserted in the conveyance of the field an express reservation of a right of way over the occupation road for the purpose of working the mines reserved. This clause Mr. Hill declined to insert, according to Morris's contention, on the ground that it was a matter outside the reference, and, according to Bradburn's contention, on the ground that Morris was not entitled to a reservation of a right of way which did not belong to him at the date of the agreement between him and Bradburn. Evidence was gone into as to what passed before the arbitrator, but this part of the case ultimately became unimportant by both parties agreeing, on the suggestion of the Court of Appeal, to have a clause inserted to the effect that nothing in the conveyance should affect the right of Morris to use the road for any purpose for which he might have lawfully used it before the agreement.

The bill in *Morris* v. *Bradburn* was first filed, alleging more than twenty years' user of the road, and also that it was a way of necessity, and praying specific performance of the agreement of the 13th of March, 1873, with a declaration that a clause should be inserted in the conveyance reserving the right to use the road for mineral purposes. It offered to perform the agreement with such a reservation. It also prayed a mandatory injunction to restrain Bradburn from allowing the railroad to continue on the road, or permitting the road to continue obstructed.

The cross bill alleged that the user of the road by Morris was for agricultural purposes only, and prayed specific performance and execution of the conveyance, with the reservation clause as to minerals which the arbitrator had settled.

*Much evidence was gone into to the effect of the [815 facts already stated, and also as to the alleged injury done to the road, and other matters. This evidence is stated in the judgments so far as material.

The causes came on to be heard before Vice-Chancellor Bacon on the 16th and 17th of March, 1876. Morris having amended his bill since the filing of the cross bill, *Bradburn* v. *Morris* became the first cause.

Hemming, Q.C., and *Maidlow*, for Bradburn: First. The whole question as to what reservation should be inserted in the conveyance was referred to the arbitrator and

decided by him, and we are therefore entitled to a decree for specific performance on that footing in our suit.

Secondly. Independently of the award, we should be equally entitled on the merits.

Morris never, at any time, acquired a right to use the road for mineral purposes, and he cannot claim to reserve anything out of his grant, which was not in him when he sold to us, and is not in him now. To call this a way of necessity is idle. A way of necessity arises when a man acquires land from a grantor who owns the surrounding land, and it is not alleged here that Morris so acquired this field. There is no such doctrine as that a man with an inaccessible close is *ipso facto* entitled to a way over the land of a neighbor from whom he has not bought: Wms. Saund. (1); *Bullard* v. *Harrison* (2); *Holmes* v. *Goring* (3); *Gayford* v. *Moffat* (4); Gale on Easements (5). The sole question is whether twenty years' user of a road for farming purposes gives a right to use it for mineral purposes, and it is settled by authority that it does not. The rule is that the owner of the dominant tenement cannot, by changing the character of the occupation of the land in respect of which the right of way or easement exists, impose a greater servitude upon the owner of the servient tenement: *Wimbledon and Putney Commons Conservators* v. *Dixon* (6); *Williams* v. *James* (7); *Cowling* v. *Higginson* (8). The 816] Wimbledon *case, decided that it would be an unlawful increase of the servitude to turn a farm road into an approach to a building estate, and to convert it into a road for mining purposes would be much worse. If there had been old open mines in the field there might have been room for argument; but there was nothing of the kind. It follows that Morris ceased to have any interest in the road when he sold to Bradburn the surface of his field, for which alone he had the right to use it. His bill, therefore, ought to be dismissed.

Kay, Q.C., and *F. G. Bagshawe*, for the plaintiff Morris: The defendant admits that he is bound to give the plaintiff every facility for getting at the mines as between himself and the plaintiff, but insists on rendering that facility nugatory.

The other adjoining landowners, especially the *dominus*, the Duke of Cleveland, might possibly limit our use of the

(1) Vol. i, p. 323.
(2) 4 M. & S., 387.
(3) 2 Bing., 76.
(4) Law Rep., 4 Ch., 133.
(5) 5th ed., p. 143, n.
(6) 1 Ch. D., 362.
(7) Law Rep., 2 C. P., 577.
(8) 4 M. & W., 245.

occupation road as the defendant seeks to limit it; but the defendant, who has bought the surface, and contracted to give the plaintiff every facility for using the road over the land which he has purchased, is bound by his contract, and cannot dispute or derogate from the right which has been expressly reserved to the plaintiff. The right of access being reserved to the plaintiff, it is reserved for all purposes whatever to which he may choose to apply it: *Proud* v. *Bates* (1); *Duke of Hamilton* v. *Graham* (2); *Ballacorkish Silver Mining Company* v. *Harrison* (3). Putting a tramway upon an occupation road is a trespass which, as an act rendering the road dangerous and inconvenient, will be restrained by injunction: *Neath Canal Company* v. *Ynisarwed Resolven Colliery Company* (4); *Attorney-General* v. *Widnes Railway Company* (5); *Reg.* v. *Train* (6); and the defendant is not entitled to alter the nature of the road and interfere in that manner with its use by the plaintiff: *Pit* v. *Lady Claverinth* (7).

Hemming, in reply.

*Bacon, V.C., after stating the facts of the case, [817 and stating that it was not true that everything was concluded by the award of Mr. Hill, continued:

Morris was unquestionably the sole owner of the land and also of other lands, and he had enjoyed and was in the enjoyment of a way over what is called an occupation road. What he had was the subject of a contract between him and Bradburn. A right of way was as much a part of the thing bargained for as either the mines or the surface, or both together. There were three things at least which were the subject of the contract—the surface, the mines, and the right of way. The right of way in words is not only not interfered with or even mentioned or referred to in any way, but it could not, in the nature of things, be so; for after the option was declared it became a contract for the purchase of a portion of the entire thing, but not of anything which Morris was not paid for and did not agree to sell. It is entirely new for me to hear it said that if an owner of a close containing mines has a right of access to that close, he is limited to the use of that close for agricultural purposes alone. There is no decision that I know of to that effect. *Wimbledon and Putney Commons Conservators* v. *Dixon* (8) has been referred to, but that case has no application, how-

(1) 34 L. J. (Ch.), 406.
(2) Law Rep., 2 H. L., Sc., 166.
(3) Law Rep., 5 P. C., 49.
(4) Law Rep., 10 Ch., 450.
(5) 22 W. R., 607.
(6) 2 B. & S., 640.
(7) 1 Bar., 318.
(8) 1 Ch. D., 362.

ever remote, to the case now before me. That was a case between the *domini* of the land and the persons who claimed the right to a servitude imposed upon that land. Between them the question was decided that, except for agricultural purposes, and any other reasonable use, the *domini* had a right to restrain the enlargement of the servitude; and the enlargement in that case being the erection of buildings, the Lord Justice said in his judgment that that would be an enlargement of the servitude. I have not here the Duke of Cleveland litigating, as the *domini* were litigating in that case. I have no means of deciding to what extent this right of way is one which in point of law can be asserted against the Duke of Cleveland, but I must treat it on the assumption that beyond all question the Duke of Cleveland has never in any way laid claim or asserted a right to this occupation road, either by possession by himself or by the interposition of others; and that the Duke makes no claim to
818] this right of way; *and if he does not, and should never do so, then the right of way is as much a part of the thing bargained for and sold as either the surface or the minerals. It was inseparable from the entirety of Morris's property before the contract was entered into. He has parted with a portion of it and a portion only, and the very terms and tenor of the contract show that he was to have the power to work his mines if, in the event which has happened, Bradburn did not choose to buy. I cannot conceive, therefore, that the case of *Wimbledon and Putney Commons Conservators* v. *Dixon* (1) has any application to the case before me. I have no parties before me so as to enable me to adjudicate on such rights as were decided in that case; all I have to say is whether, in the exercise of the jurisdiction which this court exercises in the way of specific performance, I am to admit Bradburn and to exclude Morris from something which is not included in their contract. I find it impossible to do so. I think Morris is as well entitled to-day as he was before that agreement was entered into, to the enjoyment of the mines beneath his land.

[His Lordship then expressed his opinion that there had been no mistake or omission by Mr. Hill. Morris's right to use the land for agricultural purposes was clear, and his Lordship would not impute to Bradburn so dishonest an intention as an intention to buy the surface only, and then block up the road, so as to prevent Morris from using it for his mines. It was to be sold as it stood, and Bradburn in laying down this tramway and obstructing the road was de-

(1) 1 Ch. D., 362.

parting from his bargain. Morris was entitled to have the road as it was before he sold the land. His Lordship then continued:]

Then, as to the further relief asked, against permitting the road to remain at any other level than it was in and prior to 1871, and against permitting the tramway to remain on the said road, and from constructing any other tramway or railway thereon. It is said that the tramway is not a nuisance. *Reg.* v. *Train* (1) has been referred to. No doubt that was a case of public nuisance, but the facts in this case amount to a wilful obstruction of the road; and although this is not a public nuisance, yet, as between these parties, in my opinion a nuisance has been committed by *the [819 one against the other, which entitles Morris to the relief prayed by his bill. As to the second suit, every single point which was at issue between the parties was distinctly raised, and must have been decided in the first suit, and I cannot conceive, and certainly no reason has been given, why so unnecessary a proceeding as that of filing a cross bill has been resorted to.

For these reasons, I am of opinion that Morris, when he asks to have the unobstructed use of the way which is the access to his field, which he had before he sold that field, and which he did not sell when he sold a portion of his property, for he did not sell any part of the right of way which he wanted himself for the purpose of working his mines, is entitled to have things restored to their original condition. It is not necessary to be so strict as to say that the road must be restored to the same level as it was before, but it is necessary to say that the road must be restored to a state in which it presents no such obstruction as did not exist before to Morris working his mines. I think, as it is clearly proved that the tramway is a dangerous obstruction to that right of way over the occupation road, the defendant Bradburn is bound to remove his tramway. About this I had some doubt at first. I thought it was possible that the tramway might remain, and that some compromise might be made between the parties upon that matter, but upon considering it further I am of opinion that the existence of a tramway upon so narrow a road as this, especially when it crosses a bridge, is a nuisance and obstruction inconsistent with the contract between the parties, and must be abated in order specifically to perform the contract between the parties. And inasmuch as the second bill was, in my

(1) 2 B. & S., 640.

opinion, wholly unnecessary, that must be dismissed with costs. Upon Morris's bill, he is entitled to a decree such as I have described, and he is entitled to the costs of the suit.

From this decree Bradburn appealed, and the appeal came on to be heard on the 3d of July, 1876.

Hemming, Q.C., and *Maidlow*, for the appellant, used the same arguments as in the court below.

Kay, Q.C., and *F. G. Bagshawe*, for the respondent, in
820] addition *to the arguments used in the court below, objected that Bradburn had not proved that the soil of the road was the property of the Duke, and contended that it must be presumed that the soil *ad medium filum* belonged to the owners of the land on the side opposite to the Duke's estate, of whom Morris was formerly one. Morris, therefore, was entitled to the road as being partially on his own soil, and this right, so far as mines were concerned, he had never parted with, because on his former sales to Bradburn of the land adjoining the road he had reserved the minerals, and with them, consequently, his old right to use the road for getting them.

Hemming, in reply: The pleadings and evidence amount to an admission by Morris that the soil of the road is not in him. His claim is founded on easement and on nothing else. If necessary, there can be an inquiry as to the ownership, but Morris comes here as plaintiff, and asks for the injunction, which is the one substantial subject of dispute. If he relies on ownership of the road, he must allege and prove it. If he had alleged it we should probably have disproved it more formally. As it is, we have done enough.

In the course of the argument James, L.J., suggested a clause to be put into the lease to the effect stated below. This was accepted by both parties.

JAMES, L.J.: In this case the real dispute between the parties was the claim on the part of Morris to compel Bradburn to remove the railroad or tramroad by means of which Bradburn was carrying on his own manufactory, and Morris succeeded in obtaining from the Vice-Chancellor a mandatory injunction accordingly. In order to sustain that mandatory injunction Morris must clearly make out that what Bradburn is doing is an infringement, and such an infringement of his legal rights as to entitle him to that interposition of the court. The burden of proof is upon Morris in that respect.

Now Bradburn's case is this. He says, "I admit there
821] was an *occupation road, I admit that I have laid

rails upon that occupation road, but I have done it upon that which I say is the Duke of Cleveland's land, and with the assent of the Duke of Cleveland so far as it was his land. On a small part of it, I have done it on the canal company's land with the assent of the canal company, and you have not established on the part of the canal company, or upon the part of the Duke of Cleveland, any right whatever to interfere with what I have done."

The right which Morris alleged was a right to have access along this occupation road to a piece of land for mineral purposes if and when he should require to use it for these mineral purposes. At present there is no evidence before us that he is at all likely for some considerable time to use the road for the purpose of getting at the mines which he has excepted and reserved to himself in the manner in which he wishes his rights to be reserved in the conveyance to be made. It would have been a very strong thing, even if his title had been clearer than it is, to interfere with the actual present use by a manufacturer of his own property for the purpose of his manufactory, using it in the way most convenient to himself for the usual and proper mode of getting connection between his works and the railway; it would have been a very strong thing to interfere with that merely because it might at some future time, if this was continued in the same way, interfere with other rights which might then be exercised by the plaintiff Morris.

But, independently of that, it appears to me that Morris was bound to make out to our satisfaction that he had the right which he claimed, and that the right was and had been interfered with by Bradburn. Now, he certainly has not proved at all satisfactorily—indeed, he has not proved, as it seems to me, in any way—the use of this occupation road for the purposes which he alleged as against the Duke of Cleveland or as against the canal company; he has not proved it by any satisfactory evidence—the *onus probandi* being upon him—as against Bradburn himself as the owner of the two pieces of land. Under those circumstances Morris has really failed to prove that which was incumbent on him to prove, and therefore he is not entitled to the mandatory injunction, or to any such injunction as he has asked for.

*There is another point, with regard to the frame [822 of the conveyance. Morris says: "I was the owner of a piece of ground to which there was an occupation road. I have parted with the surface of that ground to Bradburn, and have reserved to myself the minerals under the surface.

By doing that I did not mean to interfere with my right in any way; whatever right I had with regard to the occupation road, for any purpose connected with the property, whether as to the surface or as to the minerals, I did not mean to part with." But he had no power to give himself any rights additional to those which he then had, though he had a right to have it made clear that he was not, by parting with the surface of the land, in any way depriving himself of any right which he then had as owner of the whole to use the occupation road for any purposes for which he might then have lawfully used it. Therefore I propose to insert in the conveyance a declaration in the words I have mentioned. That would reserve any right he had against Bradburn or the Duke of Cleveland, and we do not prejudice that right in any way whatever; we merely preserve the thing to him in *statu quo*.

The insertion of those words would never, I am satisfied, have been objected to on behalf of Bradburn, and the whole of the suits on both sides seem to me to have been occasioned by a contention of Morris that he had a right to have the rails removed by the interposition of this court. Having failed in that, which was the substantial matter in litigation between them, I am of opinion that Morris must pay Bradburn's costs.

MELLISH, L.J.: I am of the same opinion. I think that, with reference to the right that Morris has to the use of the occupation road, whatever right he had to use the occupation road for the purpose of working the minerals under the surface of the land which he had sold to Bradburn, he is entitled to have reserved to him; but if he had, at the time when he owned both the surface and the minerals, no right to use the occupation road for the purpose of working the minerals, I do not see how he can have obtained that right by his agreement with Bradburn.

As far as regards the main question in this case, whether
823] there *ought to be a mandatory injunction to remove these rails, it appears to me that Morris must make out that he actually had at the time when he owned both surface and minerals a right to use this occupation road for the purpose of getting his minerals. Secondly, he must prove that he does now want to get his minerals, and that the railway as it exists is an obstruction to him. Now, in my opinion, the evidence before us leaves it extremely doubtful as to what the extent of right over the occupation road is. If it had been proved clearly that Morris wanted immediately to get his minerals, possibly we should have thought it right that

there should be a further inquiry as to what were the particular rights of Morris over this occupation road. But inasmuch as there is no satisfactory evidence that he wants at the present time to get the minerals, and as he also, in my opinion, has not by the evidence now before us made out at all satisfactorily what are his rights as to the occupation road, I do not think it would be proper now to have an inquiry which might be merely speculative. The way in which he appears to have put his case in the bill is that he had by way of easement a right of way to these lands at the end of this road. As to that, his evidence simply means that for a period of twenty years or more the occupier of these lands had used the occupation road for purely agricultural purposes. Now, according to our decision in the case of *Wimbledon and Putney Commons Conservators* v. *Dixon* (1), that is not of itself sufficient to prove a right to use the road for the purpose of getting minerals, no minerals having, as far as the evidence goes, ever been got upon the lands now in question. But then it is put very forcibly that this occupation road being in part bounded by the property of the Duke of Cleveland on one side and by the property of other persons on the other, there was a *prima facie* presumption that the boundary between the two properties was the *medium filum* of the road. In that state of things, if each party had given up his own portion in order that there might be a road for their common advantage, I am not prepared to say that possibly that would not be a road for all purposes: because of course a man would be entitled to use his half of the road for any purpose that he liked, and I do not see *how you could restrict the [824 user of the whole road. It would not come within the general rule that you were putting a greater burden upon the servient tenement, because the one tenement is in that point of view as much a dominant tenement as the other, and they would mutually get the advantage of having the right of way and using it for all purposes.

But I am convinced that it is quite an afterthought to put Morris's case in that way—that is not the way it is put in his bill. Bradburn's attention was not called to this, and it is impossible to say that if his attention had been called to it he might not have got possibly perfectly clear evidence that the whole of the occupation way was the Duke of Cleveland's. To my mind, the burden of proof being upon Morris, he has not satisfied me that he has that right, and certainly we cannot grant a mandatory injunction unless

(1) 1 Ch. D., 362.

he has clearly made out his right, and I think also unless he made out that he had a present want of using the read. On the whole, I am of opinion that he has not made out his case.

BAGGALLAY, J.A.: I am of the same opinion. [His Lordship then stated the facts of the case.]

It is unnecessary further to consider the question of the reservation in the conveyance, because a declaration which the Lord Justice suggested has been accepted by both parties. I am bound to say that in my opinion the draft conveyance which was originally prepared would have been sufficient without that addition; but, inasmuch as disputes have arisen between the parties, it is desirable that the precise terms should be inserted in the conveyance, in order to prevent further disputes. As pointed out by the Lord Justice, the real cause of the dispute has been the assertion of a right on the part of Morris to have the tramway removed from the occupation road. Now it appears to me that there is no foundation whatever made in the pleadings in this suit for obtaining an injunction to that effect. The right and the title which have been asserted at the bar, and which appear to have been really asserted by the pleadings, are disputed, and I am unable to see on what grounds any such injunction could have been granted. If there is any such right in 825] the plaintiff Morris, *and if at any future time there should be an interruption of any right to which he is entitled as to the use of that road for carrying on his mineral business, then would be the proper time to apply either by an action for damages in respect of the interruption or for a mandatory injunction, if he can obtain it.

MINUTES:—Reverse the decree of 17 March, 1876. Order that the bill in *Morris* v. *Bradburn* be dismissed with costs. Order that, upon Bradburn paying to Morris £2,230, the purchase-money for the surface of the land with interest, Morris do execute a proper conveyance of the surface only of the land to Bradburn, such conveyance to contain a proper reservation of the mines and minerals to Morris, and contain a clause in the following words: "Nothing herein contained shall extend to affect any right of the said John Morris, his heirs, executors, administrators, or assigns, to use the occupation road leading to the Wolverhampton and Wednesfield main road for all or any purposes for which on the 13th of March, 1873, he might have lawfully used it." Morris to pay to Bradburn the costs of *Bradburn* v. *Morris* and of the appeal.

Solicitor for Morris: *H. G. Field*, agent for T. Waterhouse, Wolverhampton.

Solicitor for Bradburn: *J. M. Chamberlain*, agent for J. C. Smith, Wolverhampton.

See 8 Eng. Rep., 774 note.

As to when a way does not pass as an "appurtenance," but the owner of the dominant and servient tenements may close it: Parsons *v.* Johnson, 68 N. Y., 62.

As between lessor and lessee, the proper question to be left to a jury, as to the right to a way of necessity, is whether the easement was, at the time of making the lease, necessary for the fair and reasonable enjoyment of the demised premises. And, *it seems*, that the acts of the parties are evidence of what was necessary for such enjoyment: Geraghty *v.* McCann, Irish L. R., 6 C. L., 411.

A right of way from necessity is created where the owner sells land which is wholly surrounded by other lands of the grantor. In such case, the purchaser will have the right of way over the grantor's land, to and from his own.

If the party sells land not entirely surrounded by his own, but only adjoining the same, the purchaser acquires no right of way, by implication, over the remaining land of the grantor, even though it lies between the land bought and the public highway: Kuhlman *v.* Hecht, 77 Ills., 570, explaining Howton *v.* Frearson, 8 Term Rep., 50.

A party having conveyed a portion of his land, over which was the only means of access to the remaining land: Held, that a right of way by necessity to the remaining land was *reserved:* Pingree *v.* McDuffie, 56 N. H., 306; Bowen *v.* Connor, 6 Cush., 132, 3 Kent's Com., 422.

A. being entitled at his own expense to make a road for himself across B.'s farm at the most convenient point, it was agreed between them that A. should use B.'s road on certain terms: Held, that this agreement was a mere license, not coupled with any interest, or incident or auxiliary to a sale or grant, and was therefore revocable, and being revoked at law, no equity arose to interfere with A.'s legal right on the ground of encouragement on the part of the one, or forbearance and irreparable inconvenience on the part of the other.

Semble (per Esten, V.C.), that a way of necessity, to a purchaser of land, is the one most convenient to the grantee by the shortest cut over the lands of the grantor; but (per Spragge, V.C.), that the right to select such a way of necessity is qualified by the effect which the selection of a particular line would have upon the interests and convenience of the grantor: Fiedler *v.* Bannister, 8 Grant's (U.C.) Chy., 257.

[3 Chancery Division, 826.]

M.R., Feb. 18, 1876.

*Eardley v. Granville. [826

[1874 E. 63.]

Copyholds—Mines and Minerals, Lessee of—Possession of Soil by Copyholder—Carriage of Non-manorial Minerals over and under Copyholds—Acquiescence—Injunction.

In an ordinary copyhold manor the estate of the copyholder is in the soil throughout except as regards trees, mines, and minerals, the property in which remains in the lord. When the lord has removed minerals the space left belongs to the copyholder. The right of the lord is not like that of a vendor of freeholds who has reserved mines, and remains the owner of the vacant space from which minerals have been removed.

In a Crown manor, where the Crown and its lessees were by custom entitled to enter on the land for the purpose of working the minerals, the defendant, the lessee of the Crown mines, who was also lessee of the S. mine outside the manor, claimed a right to use a crut or underground way beneath the land of the plaintiffs, who were copyholders of part of the manor, for the purpose of conveying minerals from the S. mine to the deep pit by which the manorial mines were worked, and thence by a branch railway constructed by the defendant over part of the same copyhold to the main line:

Held, that such user was a trespass, and that, no case of acquiescence on the part of the plaintiffs or their predecessor in title having been established, they were entitled to an injunction to restrain the defendant from carrying the S. minerals over or under their copyhold land.

THE plaintiffs were copyholders of part of the manor of Newcastle-under-Lyne, as successors in title of one Ann Adams.

The Crown, in right of the Duchy of Lancaster, was seised in fee of the said manor, and of the collieries, mines, seams of coal, and minerals lying beneath the surface of all lands within the manor or lordship. The defendant, Earl Granville, was lessee under the Crown of the said colleries, mines and minerals.

The defendant alleged that from time immemorial the Crown and its lessees had the right to work the colleries and mines, and for that purpose to enter upon the lands and on such parts of the surface (not being land covered with buildings) as might be required for the purpose of working the mines, making to the tenants and occupiers reasonable compensation; and that such right had been exercised by 827] the Crown and its lessees beyond the *time of legal memory, and that the copyhold tenants of the manor held their tenements subject to such custom.

The defendant's predecessors in title had from the year 1731 been lessees, under the Crown, of the said collieries, mines and minerals, under successive leases for thirty-one years, renewed from time to time, and conferring on the lessees the power to exercise the rights belonging to the Crown.

In 1852 the defendant was lessee under a lease of the 18th of August, 1826, and was working the mines by a pit called "the deep pit."

On one side of the manor was a tract of freehold land then belonging to Ralph Sneyd, containing mines, and beyond Sneyd's land there was some freehold land belonging to Ann Adams, who was also at that time copyholder of part of the manor between the deep pit and Sneyd's freehold.

In 1851 Ralph Sneyd demised mines lying beyond the manor to one Stanier, who, by an underlease of the 30th of November, 1852, demised the same to the defendant for thirty years.

At the date of the said underlease the defendant was constructing a branch railway from the deep pit within the manor across the copyhold land of Ann Adams and Sneyd's freehold to effect a junction with the North Staffordshire Railway at Etruria. In order to complete this railway it was necessary to carry it across the freehold land of Ann Adams, who, by a lease dated the 10th of December, 1852, (the works having then been begun), demised to the defendant part of her freehold, containing 2,500 square yards, with

power to construct a railway thereon, with the necessary works, and to use the same for the term of thirty years from the 29th of September, 1852, at the yearly rent of £30, and it was thereby agreed that the defendant should within two years complete the railway, and that the same should be used for the conveyance of coal and minerals from any lands or mines belonging to or occupied by the defendant, or from any lands or mines belonging to Sneyd, and for no other purposes except to carry coal or minerals belonging to Ann Adams, her heirs or assigns, as therein mentioned, to the North Staffordshire Railway.

By a renewed lease from the Crown, dated the 27th of September, 1855, the manorial colleries, mines and minerals, were *demised to the defendant for the term of thirty- [828 one years from the 29th of September, 1854, at the rents and royalties thereby reserved, and subject to the payment of way-leave for minerals not the property of the Crown which should be brought through or worked by means of any of the pits made under the powers of the lease, or of any previous lease from the Crown, such way-leave not to extend to any coal or minerals, brought from the lands of Sneyd so long as the coal and minerals belonging to the Crown were permitted to be brought without charge through the pits or underground ways made under Sneyd's lands.

The plaintiffs, by their bill, filed in July, 1874, alleged that they had lately discovered that the defendant had, by means of the said railway across the plaintiffs' copyholds, since the 25th of March then last, conveyed large quantities of coal and ironstone from the mouth of the deep pit (which was sunk in copyhold land adjoining the plaintiffs') to the North Staffordshire Railway.

The plaintiffs also alleged that they had lately discovered that the defendant had for some time past been working or getting the coal and ironstone from the Sneyd mines, and had brought the same to the mouth of the deep pit by conveying them by an underground road or crut driven through the subsoil of the plaintiffs' copyhold, which subsoil consisted partly of seams of coal and partly of seams of clay.

The bill prayed, first, that the defendant might be restrained by injunction from conveying any coal or other produce of the Sneyd mines underneath the plaintiffs' copyhold lands, and from making, or using, or allowing any road or way to remain underneath the plaintiffs' copyhold lands for the purpose of conveying any such coal or other produce; secondly, that the defendant might be restrained from using or continuing to use any part of the surface of the

plaintiffs' copyhold land for the purpose of a railway for conveying any coal or ironstone of the Sneyd freehold lands, and for consequential relief.

The defendant, by his answer, stated that the taking a lease of the mines under the Sneyd estate, and the taking a lease from Ann Adams of a right to make a railway over her freehold property, and the construction of a complete line from the deep pit over her copyhold, were parts of one
829] scheme for the purpose of *developing and working the mines and minerals in contemplation of the renewal of the Crown lease; and he submitted that by the said lease Ann Adams gave him permission to construct the railway over her copyhold land, and to use it for the purpose of conveying minerals not only from the Crown collieries but also from the Sneyd estate. He further stated that he had paid to the occupying tenant of the copyhold a small yearly sum as compensation for the user of the surface.

The defendant further stated that the deep pit was sunk in 1848 in a piece of copyhold land adjoining that of Ann Adams, and was used by the defendant in working the mines held under the Crown, and also for working the mines under the Sneyd estate; that the coal and minerals from the Crown property were sometimes conveyed in carts from the pit's mouth and sometimes by means of the defendant's railway from the mouth of the pit to the North Staffordshire Railway, and some of such minerals (both Crown and Sneyd indiscriminately) were conveyed by the underground road or crut, which was constructed after the date of the lease of the 10th of December, 1852, through the mineral ground at a depth of 500 yards below the surface of Ann Adams' copyhold land to the bottom of the pit, and were thence raised to the surface.

The defendant further stated that the use of the railway and the underground passage had been notorious for above twenty years, also that the mineral ground beneath the plaintiffs' copyhold land where the crut had been made consisted partly of seams of coal and ironstone, and partly of strata of clay, all which seams and strata belonged, as he was advised, to the Crown, and that the right to work and get, and also to use, such seams and strata was vested in him as lessee from the Crown; and that he claimed the right to use such underground passage for bringing minerals from the Sneyd estate for assisting him in working the mines thereunder by virtue of the express provisions of the Crown lease, by which permission was given him to convey min-

erals from the Sneyd estate without paying any way-leave for the same.

Southgate, Q.C., and *C. Batten*, for the plaintiffs: The defendant, as lessee under the Crown, is only entitled to *use the railway over the plaintiffs' lands and the [830 underground road for the purpose of carrying the Crown minerals, not those worked in the Sneyd mines, which are outside the manor.

Although the property in mines under copyhold lands is in the lord, the possession of the lands is in the tenant, who can maintain trespass in respect of an unauthorized use of his lands: *Lewis* v. *Branthwaite* (1); *Keyse* v. *Powell* (2).

In *Bowser* v. *Maclean* (3) it was held that the lord of a manor might drive carriages along a tramway under copyholds of the manor for the purpose of working mines within the manor, but not of working mines beyond its limits.

The cases which relate to the rights of a lessor of freehold land who has reserved mines and minerals from the demise do not apply. In *Proud* v. *Bates* (4), where the lord of a manor had granted a lease of waste land of a manor with a reservation of the mines, with power to work them and with free way-leave to and from the same, it was held that the lessor and those claiming under him were entitled to an absolute way-leave for minerals not under the demised property. That case, however, will not support the defendant's contention, and does not apply to the case of a copyholder who is entitled to the soil as well as the surface. So, likewise, the case of *Duke of Hamilton* v. *Graham* (5) has no application.

In *Goodson* v. *Richardson* (6) the court granted an injunction to restrain the continuance of water pipes which had been laid in the soil of a highway without the consent of the owner of the soil. In like manner we contend that the carrying of minerals from the Sneyd mines over or under the plaintiffs' land is a trespass which they are entitled to come to this court to restrain.

The defence on the ground of acquiescence cannot be sustained.

Chitty, Q.C., and *Cozens-Hardy*, for the defendant: When a manor contains minerals which are the property of the lord, he and his lessees are entitled to work them in any way he thinks best; the defendant, therefore, as lessee under

(1) 2 B. & Ad., 437.
(2) 2 E. & B., 132.
(3) 2 D. F. & J., 415.
(4) 34 L. J. (Ch.), 406.
(5) Law Rep., 2 H. L., Sc., 166.
(6) Law Rep., 9 Ch., 221.

831] the Crown, *is entitled to the use of the underground road or crut without the interference of the copyholder, who has no ownership in the subsoil: *Lewis* v. *Branthwaite* (1); *Duke of Hamilton* v. *Graham* (2). The case is analogous to that of *Ballacorkish Silver Mining Company* v. *Harrison* (3), where a reservation had been made of minerals in the Isle of Man to the Crown, and it was held that the Crown was entitled to the use of all waters percolating by natural process into the mines when opened.

As regards the use of the railway, the plaintiffs are precluded from raising any objection by the acquiescence of Ann Adams, their predecessor in title, who must be taken to have allowed the railway to be constructed over her copyhold land, by granting a lease of her freehold land for the purpose of carrying the Sneyd minerals, which she knew could only have been carried from the deep pit over her copyhold land. Such acquiescence disentitles the plaintiffs to relief: *Dann* v. *Spurrier* (4); *Duke of Beaufort* v. *Patrick* (5); *Master, &c., of Clare Hall* v. *Harding* (6).

JESSEL, M.R.: This is really an undefended suit; when you come to look at the admissions in the answer, there is no case whatever on the part of the defendant. [His Lordship then stated the facts.] It is said that because Ann Adams, by her lease of the 10th of December, 1852, gave the defendant the right to carry the coals or minerals from any mines belonging to him or belonging to Sneyd (for this purpose it is immaterial)—therefore she gave him a right to carry not only over her freehold, but over the copyhold; and it is said she must have given him the right for this reason, because he afterwards made a communication underground from the pit by means of a crut to Sneyd's lands on the other side of the copyhold lands, that is, instead of sinking a pit in the freeholds of Sneyd, which adjoined the freehold of Ann Adams, he made a communication underground from the deep pit by a crut through the copyhold land, and then carried the coal up the deep pit and thence along the railway.

832] *But it would appear that at the time Ann Adams granted the lease of a part of her freehold land for the purpose of the railway, and gave the defendant the right to carry coals from any mines which belonged to or were occupied by him—at that period she did not know how he was going to work the mines of Sneyd. She expressly granted

(1) 2 B. & Ad., 437.
(2) Law Rep., 2 H. L., Sc., 166.
(3) Law Rep., 5 P. C., 49.
(4) 7 Ves., 231.
(5) 17 Beav., 60.
(6) 6 Hare, 273.

the right over her freehold lands, but she did not grant any right over her copyhold lands. Acquiescence is out of the question. The Earl had not only a right to make the works, but he did make almost all the works previously, and he had a right to make them without her consent and in spite of her refusal. There is, therefore, no acquiescence. If he claims a right to carry coals from the Sneyd mines over her copyhold lands, he must make out some legal title. But he has not a shadow of legal title; and as to acquiescence, there is no equitable title: consequently, as far as that is concerned, he is a mere trespasser, and he being a trespasser comes within the well-established doctrine of *Goodson* v. *Richardson* (1), and *Rochdale Canal Company* v. *King* (2), where damages would be no compensation for a right to property, and the plaintiffs are entitled to prohibit him by injunction. There may be little or no injury to the estate, but if they restrain him he will be glad to pay a way-leave.

The other part of the case is still more singular when I look at the answer. The crut was made in the way described, and the result was that the coal passing under the copyhold lands of the plaintiffs, formerly of Ann Adams, it was brought from Sneyd's land out of the manor, through an opening or tunnel under the copyhold lands belonging to the plaintiffs, without their consent.

The law upon that subject has been well considered, and it has been settled by authority which is certainly binding upon me. The law seems to stand in this way: The estate of a copyholder in an ordinary copyhold (for it is an estate) is an estate in the soil throughout, except as regards for this purpose timber trees and minerals. As regards the trees and minerals, the property remains in the lords, but, in the absence of custom, he cannot get either the one or the other, so that the minerals must remain unworked, and the trees must remain uncut. The possession is in the copyholder; the property is in the lord. If a stranger cuts *down the trees, the copyholder can maintain trespass [833 against the stranger, and the lord can maintain trover for the trees. If the lord cuts down the trees, the copyholder can maintain trespass against the lord; but if the copyholder cuts down the trees, irrespective of the question of forfeiture, the lord can bring his action against the copyholder.

So in the case of minerals. If a stranger takes the minerals, the copyholder can bring trespass against the stranger for interfering with his possession, and the lord may bring trover, or whatever the form of action may be now, against

(1) Law Rep., 9 Ch., 221. (2) 2 Sim. (N.S.), 78.

the stranger to recover the minerals. The same rule applies to minerals as to trees. If you once cut down the tree, the lord cannot compel the copyholder to plant another. The latter has a right to the soil of the copyhold where the tree stood, including the stratum of air which is now left vacant by reason of the removal of the tree. So, if the lord takes away the minerals, the copyholder becomes entitled to the possession of the space where the minerals formerly were, and he is entitled to use it at his will and pleasure. If you have a shaft made for working the mines, the copyholder may descend in the shaft, and either walk about in the space below, or use it for any other rational purpose. That is the position of the copyholder. That being so, and there being no minerals in this crut, if that is the law, the Earl, as Crown lessee, cannot have a greater right than the Crown, that is, the lord or lady of the manor. He has, therefore, no right now to trespass on the copyhold for any purpose whatever, because I assume he does not want it for the purpose of working the manorial minerals; for that purpose he has a right to use it; but assuming that he does not want it for that purpose, but only wants it for the purpose of carrying the coal from under Sneyd's estate—that is, foreign coal—he has no right to use it at all. Of course the injunction to be granted will only restrain him from using it for that purpose; it will not affect the other right. It is not trespass while he carries Crown minerals. It is trespass when he uses it for any other purpose.

I take it that the law is clearly settled, and I am surprised to hear it disputed. In the first place, the law is laid down, perhaps not as accurately as might be wished as 834] regards the words used, *by Lord Campbell in *Bowser* v. *Maclean* (1): "I am inclined to think that a mistake has been committed in not distinguishing between a copyhold tenement with minerals under it, and freehold land leased with a reservation of the minerals"—he should have said "of the mines," but he has used the words "reservation of the minerals," meaning an exception of the mines—"or freehold land where the surface belongs to one owner and the subsoil, containing minerals, belongs to another, as separate tenements divided from each other vertically, instead of laterally." That is quite intelligible; what he means is this—he does not say it, but he means it—If a freeholder grants lands excepting mines he severs his estate vertically, i.e., he grants out his estate in parallel horizontal layers, and the grantee only gets the parallel layer granted

(1) 2 D. F. & J., 420,

to him, and does not get any underlying mineral layer or stratum. That underlying stratum remains in the grantor. The freeholder retains the mineral stratum as part of his ownership; and whether or not he takes the minerals or subsoil out of the stratum, the stratum still belongs to him as part of the vertical section of the land. But he says in the case of a copyholder, that is not so, because the copyholder, though he has no property in the stratum in the sense of being entitled to take the minerals, has property and possession in this sense, that the moment the minerals are taken away the space is in his possession, and he only can interfere with it, the lord having no right to do so.

The same proposition was laid down in the case of *Lewis* v. *Branthwaite* (1), where Lord Tenterden expressly puts it that there is no distinction between trees and minerals as regards the law of copyholds, and so in the case before Lord Campbell of *Keyse* v. *Powell* (2).

Then it has been suggested that the recent case of *Duke of Hamilton* v. *Graham* (3) has somehow or other altered the law; but it has not. That was a Scotch case, and it was treated as being the same as a grant by an English freeholder. It exactly concurs, therefore, in its reasoning with the decision of *Vice-Chancellor Wood in the case of [835 *Proud* v. *Bates* (4) and the decision of Lord Campbell in *Bowser* v. *Maclean* (5), that where a freeholder grants lands excepting the mines, he intends, first of all, as a matter of construction, to except not merely minerals, but the portion of the subsoil containing the minerals; in other words, to retain a stratum of the property. And if he does that, of course the lessee or grantee has no title whatever to the portion of the stratum reserved. That is all that the case of *Duke of Hamilton* v. *Graham* (3) decided. It decided that the same law applies to Scotland which applies to England. In a case like that the word "mines" meant subsoil containing the minerals, and not merely the minerals themselves.

The only other case that was referred to was the case in the Privy Council from the Isle of Man of *Ballacorkish Silver Mining Company* v. *Harrison* (6). It was a case decided upon exactly the same principle. In that case it was not merely a lord of the manor depending upon his ordinary title as lord of the manor, but also upon the act of Tynwald, which was an act of Parliament of the Isle of Man, by which the mines were reserved to him; and Lord

(1) 2 B. & Ad., 437.
(2) 2 E. & B., 132.
(3) Law Rep., 2 H. L., Sc., 166.
(4) 34 L. J. (Ch.), 406.
(5) 2 D. F. & J., 415.
(6) Law Rep., 5 P. C., 49.

Penzance, who gave the judgment, said this (1): "The act affirms that he has excepted out of the grant not only the minerals, but that portion of the soil which contains the minerals, and which constitutes the 'mine.'" Consequently they had only to decide this: that on their own interpretation of the act the mine, meaning the portion of the subsoil containing the minerals, being excepted, remained in the lord of the manor, and the copyholder had nothing whatever to do with it. That was, therefore, entirely distinguishable from the ordinary case of an English copyholder who had the possession of the minerals. So far from interfering with the law as laid down in other cases, that case confirms it, because the Privy Council would not have had recourse to the act of Parliament if the law had given it to the lord of the manor as part of the customary law applicable to copyholders, and he would have been entitled to it entirely irrespective of the legislative provisions upon which he relied.

836] *That being so, it appears to me perfectly clear on this part of the case also, that the plaintiffs are entitled to the injunction which they seek. The plaintiffs will have the costs of the suit.

Solicitors for plaintiffs: *Wedlake & Letts*, agents for Keary & Marshall, Stoke-upon-Trent.

Solicitors for defendant: *Worthington Evans & Cook*, agents for Hand, Blakiston & Everett, Stafford.

(1) Law Rep., 5 P. C., 62.

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A.

ACQUIESCENCE.

See FRAUDS, STATUTE OF, 143.

ADEMPTION.

See WILLS, 524, 700.

ADMIRALTY.

1. A cargo of railway bars was shipped under a charterparty from a port in England to Taganrog in the Sea of Azof, "or so near thereto as the ship could safely get;" freight to be paid in London against certificate of right delivery of cargo. On the arrival of the ship on the 17th of December at Kertch, a port about thirty miles from Taganrog, which was as near as he could then get, the captain found the sea blocked with ice till the ensuing spring; and he proceeded to discharge the cargo, notwithstanding the opposition of the charterer's agent. By the bill of lading the cargo was deliverable at Taganrog to a Russian railway company, "freight and conditions as per charterparty." As no bill of lading was produced at Kertch, the captain placed the cargo in charge of the custom house authorities; and they, on the 27th of December, delivered it to the agent of the railway company, on his producing written authority from the company together with copies of the charterparty and bill of lading, notwithstanding the captain's claim to retain it until the freight had been paid. The agent of the company gave a written acknowledgment that he had received the cargo "on the power of the charterparty and bill of lading passed to me by the railway company." The ship then sailed from Kertch. The shipowner having sued the charterers for freight:

Held, first, that the plaintiff was not entitled to full freight, as the delivery at Kertch was not a delivery, so near to Taganrog as the ship could safely get, within the charterparty; secondly, by Mellor and Quain, JJ., that the plaintiff was entitled to no freight; Cockburn, C.J., being of opinion that he was entitled to freight *pro rata*. *Metcalfe* v. *Britannia, etc.* 83

2. The defendants chartered a ship to carry a cargo of rice from Akyab to a "good and safe port" in the United Kingdom, &c., calling at Queenstown or Falmouth for orders, which were to be forwarded within forty-eight hours after notice of her arrival. The charterparty contained the following clause —"It is further agreed that the liability of the charterers shall cease as soon as the cargo is on board, provided the same is worth the freight at port of discharge; but the owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage, which they shall be bound to exercise."

In an action against the charterers (who had sold the cargo before arrival)

two breaches were assigned,—1, that the defendants or their agents failed to give orders as to the ship's port of discharge,—2, that they gave orders for the ship to discharge at a port which was not a "good and safe port" within the meaning of the charterparty; whereby the plaintiffs were delayed and put to expense in obtaining payment of the freight:

Held, on demurrer, that the above clause discharged the charterers from all liability for acts and defaults of themselves or their agents happening after as well as before the ship was loaded, whether covered by the owners' lien or not. *French* v. *Gerber*. 286

3. A sailing vessel lying at anchor in a foreign river was run into and damaged by an English steamship, which was at the time under charter to proceed to a neighboring port for a perishable cargo. The master of the steamship, acting in the interests of his owners and in order to prevent the arrest and detention of his vessel at the port where the collision occurred, executed a bond acknowledging the liability of his vessel, and binding himself and his owners for the payment to the owners of the vessel run into of the damage their vessel had sustained.

In an action of wages and disbursements brought by the master against his vessel he claimed to recover, as a disbursement for which he was liable, the amount of the penalty of the bond:

Held, that the amount of the penalty of the bond must be retained in court out of the proceeds of the vessel, to answer any claim which might be established against the master under the bond. *The Limerick*. 413

4. The master of a vessel which, by his default, had been in collision with another vessel in a foreign port, gave a bond for payment of the damages, and so released the vessel:

Held, in an action for wages and disbursements brought by the master, that as against the mortgagees of the vessel the amount of the penalty of the bond would not be retained in court to meet any claim which might be established against the master under his bond. *The Limerick*. 450

5. The master of a Russian ship received on board his vessel at St. Petersburgh certain goods under bills of lading in the ordinary form: "Shipped in good order and condition, &c., to be delivered in the like good order and condition at the port of London." Certain excepted perils were enumerated in the bills of lading, and in the margin thereof were the words, "Weight, contents, and value unknown." The ship arrived at London, and the goods were delivered to the consignees, but a great number of them were found to be in a damaged state. At the hearing of a cause under the 6th section of the Admiralty Court Act, 1861, instituted on behalf of the consignees against the ship, it was proved that the damaged goods were, when taken out of the ship, in an unmerchantable state, and damaged both externally and internally, and that the damage was recent, and not traceable to any inherent vice in the goods:

Held, that, in the absence of any satisfactory proof on the part of the shipowners that the goods were in bad condition when shipped, it was not incumbent on the plaintiffs, in order to establish their case, to prove where or how the goods became damaged:

6. *Held*, that the bills of lading afforded evidence that externally, and so far as met the eye, the goods had been shipped in good order and condition. *The Peter der Grosse*. 452

7. An action under s. 6 of the Admiralty Court Act, 1861 (24 Vict. c. 10), was instituted on behalf of the assignee of a cargo of hemp and other goods against a British ship, to recover damages resulting from alleged unreasonable delay in the carriage of the goods. The owner of the ship admitted his liability, and the amount of damage was referred to the Registrar, assisted with merchants, to report upon. The Registrar found that there had been a fall in the market value of hemp, between the date when the ship ought to have delivered her cargo and the date when the delivery actually took place, and reported that the plaintiff was entitled to 5 per cent. interest on the invoice value of the hemp during the period of delay, and was not entitled to further compensation in respect of the delay in the delivery of the hemp:

Held, on appeal, that the Registrar ought to have included in the damages the difference between the market price of the cargo at the time when it

was delivered and at the time when it ought to have been delivered. *The Parana.* 465

8. A bark, lying in the Madras Roads, was chartered to proceed to the Coromandel coast, and there load a cargo for London, at a freight of 55*s.* per ton. When about to proceed to her loading port, she was run into and seriously damaged by a ship whose owners admitted their liability for the collision. At a reference before the Registrar, assisted by merchants, to assess the damages, it was proved that, owing to the bark having been delayed at Madras for repairs, rendered necessary by the collision, the charterers had acquired a right to cancel the charterparty, and that they had cancelled the charterparty; afterwards, when the repairs were completed, the bark being unable to procure more profitable employment, sailed from Madras for London with cargo, at a freight of 45*s.* per ton. The Registrar disallowed a claim made by the plaintiffs in respect of the loss of the charterparty so cancelled, and the plaintiffs appealed to the court:

Held, that the case must be again referred to the Registrar, with directions to include in the amount of damages a sum in respect of the loss of the charterparty. *The Star of India.* 476

9. A German steamship was wrecked in British waters and the lives of ten of her passengers were saved by the crews of a pilot cutter and three gigs. Subsequently divers, employed by the owners of the cargo of the steamship, succeeded in recovering from the wreck a large amount of specie. A cause of salvage was instituted on behalf of the owners and masters and crews of the pilot cutter and the gigs against the specie:

Held, that the plaintiffs were entitled to be paid salvage remuneration out of the proceeds of the specie. *Cargo of the Schiller.* 483

See DEMURRAGE.
JURISDICTION, 422, 428, 433.

AFTER-BORN CHILDREN.

See WILLS, 815.

AGENT.

See PRINCIPAL AND AGENT, 169, 175 *note.*

AGREEMENT.

1. The plaintiff, a master mariner, accepted the command of the defendant's ship under a written agreement, as follows: "I hereby accept the command of the ship City Camp on the following terms: Salary to be at and after the rate of £180 sterling per annum." "Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the command, and the owners have the option of paying or not paying his expenses travelling home." "Wages to begin when captain joins the ship":

Held, that the plaintiff could not (except under unusual circumstances) be dismissed without a reasonable notice. *Green* v. *Wright.* 224, 228 *note.*

2. Where there is an irreconcilable discrepancy between a lease and its counterpart, the former must be taken to be correct rather than the latter.

3. Where the statement of the duration of the term in the habendum differs from that in the reddendum, the statement of the term in the latter will be treated as surplusage, and the former must prevail.

4. In 1784, a lease was granted, habendum for 94¼ years, reddendum for 91¼ years. The counterpart in both places had it 91¼ years; and there were circumstances (not strictly evidence) which tended to show that the term really intended to be granted was 91¼ years only. In ejectment by the assignee of the reversion against the assignee of the lessee, brought in 1876:

Held, that, the lease being the superior part of the instrument (treating the lease and counterpart as one deed), the statement in the habendum thereof must prevail; and that, as between the parties to the action, there could be no reformation. *Burchell* v. *Clark.* 232, 238 *note.*

See CONSIDERATION, 113.
FRAUDS, STATUTE OF.

ALDERMEN.

See MUNICIPAL CORPORATIONS, 388, 398 *note*.

ANNUITY.

See LEGACY, 779.
LIFE ESTATE, 510.

APPOINTMENT.

1. Under a marriage settlement made in 1820, a father had a power of appointment among his children. He afterwards borrowed the funds subject to the power, amounting to £6,000, from the trustees of the settlement, on the security of a freehold estate which was his own property.

On the marriage of his only daughter in 1853, the father settled a sum of £3,000 upon her out of his own property.

In 1863, the father executed three deeds of even date. By the first, he made a voluntary settlement of the freehold estate with some other property on his eldest son, E., for his life, with remainder for the benefit of E.'s children or remoter issue, as E should appoint, and in default of appointment, to E.'s children equally, and in default of children, to himself in fee.

By a second deed, the father appointed the whole of the £6,000 under his marriage settlement to E., absolutely; and the same deed contained a release by the father and his wife, and also by E. and the surviving trustee of the settlement, of the mortgage debt of £6,000, and a conveyance by the same parties of the freehold estate discharged from the mortgage to the uses of the voluntary settlement of even date.

By a third deed, the father gave the residue of his property to his only other son, R.

The father made his will, bearing the same date, and thereby confirmed the three deeds of even date, and charged his ultimate remainder under the first deed with £3,000, in favor of his only daughter, M., and subject thereto, gave the same to R.

The father died in 1864.

E., although made a party to the two first-mentioned deeds of even date, was not consulted on their preparation, and he at first refused to execute them, but he did in fact execute them in the year 1871:

Held (reversing the decision of Malins, V.C.), that in the opinion of the court the arrangement by which the mortgage debt of £6,000 had been released and the ultimate remainder reserved to the father had not been made for the purpose of benefiting the appointor; and that the appointment was not fraudulent or invalid:

2. *Held*, also, that the condition annexed to the appointment, that E. should release the estate from the mortgage debt, was not binding upon E. until he assented to the arrangement; and that he might have claimed the benefit of the absolute appointment in his favor discharged from the condition, but that, having executed the deeds, he had by his voluntary act assented to be bound by the conditions. *Roach* v. *Trood*. 598

See POWER, 802.
WILLS, 700.

APPROPRIATION.

See BILLS OF LADING, 632.

APPURTENANCES.

See WAY.

ARREST.

1. When a warrant has been issued to apprehend a person for an offence less than felony, the police officer who executes it must have the warrant in his possession at the time of arrest.

2. The appellant was summoned to answer an information charging him with trespass in pursuit of conies; as he did not appear in obedience to the summons, a warrant was issued for his ap-

prehension. The respondent, being a police officer to whom the warrant was directed, but not having it in his possession, attempted to arrest the appellant, who thereupon committed an assault upon him :

Held, that the appellant could not be convicted upon an information charging him with assaulting the respondent in the execution of his duty. *Codd* v. *Cabe*. 353, 358 *note*.

ASSESSMENT.

See MUNICIPAL CORPORATIONS, 114, 118 *note*, 341, 348 *note*, 375, 379.

ASSIGNMENT.

See BILLS OF LADING, 139, 632.

ATTORNEYS.

1. The defendant, a solicitor, was employed by one H. (who was a director and promoter of a limited company then in liquidation), with the privity of three other persons, the holders as nominees of H. of certain shares in the company, to take proceedings in connection with the winding up of the company. H. deposited with the defendant the certificates of the shares for the purpose of enabling him to carry out his instructions, and the defendant received from the liquidator of the company certain checks in respect of the shares standing in the names of those persons. In the meantime H. transferred to the plaintiffs his interest in the shares, with notice of the lien and charge of the defendant thereon for his costs, and the defendant, acting upon the retainer of the plaintiffs, continued the proceedings, and ultimately received from the liquidator four several checks payable to H. and the other three persons respectively. In an action to recover these checks:

Held, that the defendant was entitled, as against the plaintiffs, to a lien upon them for his costs of all the proceedings against the company in respect of the shares. *General, etc.*, v. *Chapman*. 323, 328 *note*.

2. A solicitor was instructed to prepare a mortgage, and the title-deeds of the property were deposited with him for this purpose by the mortgagor. He was also acting as solicitor for the mortgagee, and when the mortgage was executed he continued to hold the deeds on behalf of the mortgagee. The mortgagor filed a liquidation petition, and the solicitor was employed on behalf of the trustee. The trustee sold the equity of redemption, and the solicitor received the purchase-money:

Held (reversing the decision of the County Court judge), that the solicitor had a lien on the deeds against the mortgagor, and was entitled to retain out of the purchase-money the amount of costs due to him from the mortgagor. *Matter of Messenger*. 529

AUTHORITY.

See BONA FIDE PURCHASER, 706, 710 *note*.

B.

BAILMENT.

See CARRIER, 238, 251 *note*.

BANKRUPTCY.

1. When the court sees that a bankruptcy petition has been made use of for an inequitable purpose, as, for instance, to extort money from the debtor, it will refuse to make an adjudication, even though there is a good petitioning creditor's debt, and an act of bankruptcy has been committed. *Matter of Davis*. 619

See PRINCIPAL AND SURETY, 613.
SALE, 841.

BETTING AND GAMING.

See WAGER, 202.

BILLS OF EXCHANGE.

See BILLS OF LADING, 632.
LIEN, 833.
PRINCIPAL AND SURETY, 613.

BILLS OF LADING.

1. The plaintiff was in the habit of receiving goods consigned to him by L. for sale upon commission, and in order to place L. in funds for the purchase of the goods, agreed to allow L. to draw upon him. The documents of title of the goods were hypothecated to the plaintiff to enable him to provide funds to meet the bills so drawn by L. The plaintiff accordingly, and at the request of L., arranged for the sale of a parcel of goods, to be shipped by a vessel chartered by the buyers, and L., having drawn upon the plaintiff for that purpose, purchased and shipped the goods. The bill of lading was handed to L., but never forwarded to the plaintiff, and L.'s affairs being put in liquidation, the liquidator placed the bill of lading in the hands of the defendants with instructions not to part with it until they were paid the value of the goods, and they accordingly refused to give it up to the plaintiff:

   Held, that the plaintiff had an equitable right to the bill of lading, and was entitled to sue the defendants for the wrongful detention of it. *Lutscher* v. *Comptoir, etc.* 139

2. How far conclusive and how far may be varied by parol evidence to show condition of cargo. *The Peter der Grosse.* 452

3. Bills of exchange were drawn by the vendor and shipper of goods upon the purchaser for the invoice prices of the goods, with a direction to place the same to account of the shipments. On the acceptance of the bills by the purchaser the bills of lading were handed over to him. The bills of exchange were dishonored at maturity, and the purchaser became bankrupt:

   Held, that there was no specific appropriation of the proceeds of sale of the goods to meet the bills of exchange. *In re Entwistle.* 632

BILL OF SALE.

See CHATTEL MORTGAGE.

BOARD OF HEALTH.

See NUISANCE, 349.

BONA FIDE PURCHASER.

1. A mortgage contained a power of sale to be exercised by the mortgagee after default, with a proviso that upon any sale purporting to be made in pursuance of the power, the purchaser should not be bound to inquire whether default had been made in payment of any principal or interest, or as to the propriety or expediency of such sale, and that, notwithstanding any impropriety or irregularity in any such sale, the same should, as regarded the protection of the purchaser, be taken to be within the power, and the remedy of the mortgagor should be in damages only. The mortgagee purported to exercise the power in favor of a purchaser for value. In a suit by an incumbrancer of the mortgagor to establish his priority over the mortgagee, it was alleged that if the accounts were taken it would show that the security was satisfied at the time of the sale:

   Held, that the sale, having been made to a *bona fide* purchaser without notice, was valid, even if the security should prove to have been satisfied. *Dicker* v. *Angerstein.* 706, 710 *note.*

BOND.

See MORTGAGE, 583.

BROKERS.

See CUSTOM, 635.
LIEN, 833.
PRINCIPAL AND AGENT, 294, 361.

BURIAL.

1. On an application for a faculty to sanction the appropriation of a portion of a churchyard, which had been closed for burials under an Order in Council, for the purpose of a public garden, the court authorized the construction of footpaths in such portion of the churchyard for the convenience of the parishioners, and the erection of gates to give them access to it. *Matter of St. George, etc.* 422, 426 *note.*

BUSINESS.

1. When receiver authorized to carry on and to pay expenses first from receipts. *Matter of Regent's Canal Ironworks.* 583

See EXECUTORS AND ADMINISTRATORS, 797.

C.

CARGO.

See ADMIRALTY, 465.

CARRIER.

1. To an action for the loss of pictures delivered by plaintiff to be carried by defendants, a railway company, defendants pleaded the Carriers Act (1 Wm. 4, c. 68), and plaintiff replied that the loss arose from the felonious acts of defendants' servants.

The pictures were loaded in a van in the defendants' yard ready to be sent to their destination, when a man represented himself to be C., a driver in the employ of M., who carried for defendants, and defendants' delivery clerk gave the man a pass which enabled him to drive the van out of the yard, and so to steal the pictures. There was a man named C. in M.'s employ, but he was not the guilty person. The court having power to draw inferences of fact:

Held, that the defendants were not estopped from denying that the thief was their servant. *Way* v. *Great Eastern, etc.* 126, 129 *note.*

2. On the deposit of articles at the cloak room at a railway station, a charge is made of 2*d.* for each, and the depositor receives a ticket on the face of which is printed the times of opening and closing the cloak room, and the words "See Back;" and on the back there is a notice that "the company will not be responsible for any package exceeding the value of £10." A placard, upon which is printed in legible characters the same condition, is also hung up in a conspicuous place in the cloak room.

The plaintiff deposited his bag (of the value of £24 12*s.*) in the defendants' cloak room, paid 2*d.*, and received a ticket. The bag was lost or stolen. In an action to recover its value, the plaintiff swore that, on receiving the ticket, he placed it in his pocket without reading it, imagining it to be only a receipt for the money paid for the deposit of the article; that he did not see the condition at the back of the ticket; nor did he see the notice hung up in the cloak room. The judge left two questions to the jury,—1. Did the plaintiff read or was he aware of the special condition upon which the article was deposited? 2. Was the plaintiff, under the circumstances, under any obligation in the exercise of reasonable and proper caution, to read or to make himself aware of the condition?

The jury answered both questions in the negative, and a verdict was entered for the plaintiff:

Held, that, upon these facts and findings, the company were responsible for the loss of the bag.

8. Mere notice, not brought home to and assented to by the depositor, is not enough in such a case to relieve the company from liability. *Parker* v. *South Eastern, etc.* 238, 251 *note.*

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CEMETERY.

See BURIAL, 422, 426 *note.*

CHANCERY.

See HEIRLOOMS, 737, 738 *note.*

CHARGE.

1. When legacy in lieu of dower charged on real estate. *Roper* v. *Roper.* 779

See LEGACY, 734.

CHARITY.

See WILLS, 544.

CHARTERPARTY.

See ADMIRALTY, 83, 286.

CHATTEL MORTGAGE.

1. Under s. 69 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), the only effect of the omission to register a mortgage of a ship is, to postpone the mortgagee's claim to that of a subsequent mortgagee or transferee whose mortgage or transfer is registered before it. Therefore the non-registration of the mortgage affords no answer to the claim of the first mortgagee to freight earned by the ship as against a purchaser of the cargo without notice of the mortgagee's title.

2. The mere omission by a person to do something which it is not his duty to do, but which if done would have prevented loss to another, is not sufficient to render such person liable for such loss, or to deprive him of any right which he would otherwise have had against the other.

3. An unregistered mortgage of a ship passes to the mortgagee the ownership of the ship, as against a subsequent equitable assignment of the freight to a third person,—at all events, in the absence of fraud or such gross and wilful negligence as is equivalent to fraud.

4. On the 1st of December, 1874, M., the owner of 60/64ths of the ship Stonehouse, then at San Francisco (the captain being owner of the residue), mortgaged his interest to the plaintiffs for £7,500 and further advances. Freights not being obtainable at San Francisco, the captain on the 2d of December procured a shipment of wheat there "on account of the ship," which cargo was consigned to the orders of the shippers, under bills of lading stating the freight payable on delivery to be 1s. per ton, and they (the shippers) drew bills on M. for the price at sixty days' sight, which were attached to the bills of lading. The ordinary freight at this time was 55s. per ton. On the 4th of January, 1875, the defendants advanced M. £3,000, and on the 22d of February a further sum of £9,000, on the security of the cargo, without notice of the plaintiffs' mortgage,—it being arranged that they should sell the cargo and receive the proceeds on M.'s account. Before carrying out this arrangement with M., the defendants searched the ship's register, and found no registered incumbrance of his interest therein. On the 2d of February, 1875, there was a further mortgage of the ship by M. to the plaintiffs for £4,000 and further advances. On the 26th of February, M. assigned to the defendants the freight of the Stonehouse at 55s. per ton; and on the 2d of March M. further mortgaged his interest in the ship to one H., who registered his mortgage on the 3d of March. The plaintiffs' mortgages were not registered until the 6th of March.

The Stonehouse arrived at Liverpool on the 13th of April, when H. and the plaintiffs took possession of her. H., being satisfied with his security on the ship, did not claim the freight.

On the 19th of February, 1875, the defendants and M. sold the cargo to J. & Co. on the terms of freight being paid at 55s. per ton; and by subsequent arrangement the defendants acquired the rights of J. & Co.:

Held, that H., the first registered mortgagee having abandoned all claim to the freight, the plaintiffs as second mortgagees were entitled to claim it as against the defendants. *Keith* v. *Burrows*. 272

5. The execution by the grantor of a bill of sale which was not made under process and which required registration was attested by two witnesses, and contained a description of the residence and occupation of each witness. The affidavit filed with the bill contained a description of the residence and occupation of only one of the attesting witnesses:

Held, that the affidavit was not sufficient to satisfy 17 & 18 Vict. c. 36, s. 1, since it did not contain a description of the residence and occupation of "every attesting witness."

6. The grantor of a bill of sale of household furniture managed a business as servant to the grantee at a weekly salary, and was allowed to reside in the house where the business was carried on and to use the furniture as part of his salary, the grantee residing elsewhere. The goods having been taken in an execution against the grantor and the bill not having been duly registered:

Held, that the goods were in the possession of the grantor within the meaning of 17 & 18 Vict. c. 36, ss. 1, 5, and that the execution creditor was entitled to them as against the grantee. *Pickard* v. *Marriage*. 364

See DIRECTORS, 751.

CHECK.

See FORGED INSTRUMENT, 368.

CHILDREN.

See WILLS, 815.

CITY.

See MUNICIPAL CORPORATIONS, 114, 118 *note*, 341, 348 *note*.

CODICIL.

See WILLS, 461, 463, 786.

COLLISION.

See ADMIRALTY, 413, 450, 476.

COLONIES.

See LIMITATIONS, STATUTE OF, 512.

COMMISSIONS.

See CUSTOM, 635.

COMMON INTEREST.

See FORMER SUIT, 717.

CONDITION.

See APPOINTMENT, 598.
SALE, 841.

CONFIRMATION.

See WILLS, 505.

CONSIDERATION.

1. Defendants, a limited company, being possessed of a process (for which a patent had been taken out in England, but not for the foreign city of B.) for the utilization of sewage, agreed to sell to plaintiff for £15,000 the sole and exclusive right to use and exercise the patent in B. Plaintiff was aware that by the law existing at B. no exclusive right to use the process there could be obtained. The object of plaintiff in buying the exclusive right was, that he might form a company for using the process in B., and might induce persons to take shares in the company under the belief that, if the company bought of the plaintiff the right sold to him by defendants, the company would be entitled to the exclusive use of the process in B. Plaintiff sued defendants to recover the £15,000 on the ground that, as there was no exclusive right to the use of the process in B., the consideration had failed:

Held (affirming the judgment of the Queen's Bench), that no action could be maintained, 1, on the ground that, although defendants ostensibly sold the exclusive right to use the process at B., yet plaintiff's object being to float a company, and induce persons to take shares in it, he had intended to buy the right whether exclusive or not, and he had in fact obtained that for which he had paid the £15,000; 2, on the ground that plaintiff being aware that no exclusive right to use the process in B. could be obtained, had entered into a contract with defendants in contemplation of a fraud upon the shareholders of the intended company. *Begbie* v. *Phosphate, etc.* 118

CONSIGNOR AND CONSIGNEE.

See BILLS OF LADING, 139.

CONSPIRACY.

See CRIMINAL LAW, 152.

CONSTRUCTION.

See SETTLEMENT.
WILLS.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 37, 72, 82 *note*.

CONVERSION.

See BILLS OF LADING, 139.
PRINCIPAL AND AGENT, 184.

CONVEYANCE.

See MINES, 399.

CORPORATIONS.

See CONSIDERATION, 113.
CRIMINAL LAW, 152.
STOCKHOLDERS, 794.

COSTS.

See SECURITY FOR COSTS, 191.
STOCKHOLDERS, 794.

COVENANTS.

1. A purchaser of a piece of land with a well or spring upon it covenanted with the vendor, who retained land adjoining intended to be disposed of for building sites, to erect a pump and reservoir, and to supply water from the well to all houses built on the vendor's land:

Held, 1, that both the benefit and the burden of the covenant ran with the land, and that the case was not within the second resolution in *Spencer's Case*, but if not, a sub-purchaser with notice of the covenant was bound by it:

2. *Held*, 2, that, though the covenant was not one of which the court would decree specific performance directly as being for the construction of works which the court could not superintend, it could be enforced indirectly by an injunction restraining the defendant from allowing the work to remain unperformed. *Cooke* v. *Chilcott*. 760, 768 *note*.

CREDITORS.

See FRAUDULENT CONVEYANCES, 844.

CRIMINAL LAW.

1. *Conspiracy*. In an indictment for conspiracy, the first count stated that the undertaking called "The Stock Exchange" was managed by a committee for general purposes, who had adopted rules and regulations for the conduct of business on the Stock Exchange, and that the defendants were respectively directors, secretary, and promoters of the E. Company, Limited, a new company which had proposed to raise a capital of £35,000 by subscriptions of shares of £1 each in addition to £15,000 represented by 15,000 fully paid-up shares. That by the rules and regulations of the Stock Exchange all persons dealing in the shares of a new company required, for the purpose of making their contracts enforceable according to these rules and regulations, that a special settling day should be fixed by the committee for general purposes, upon which day all shares which had been theretofore bought and sold should be delivered and paid for, &c. That application had been made on behalf of the defendants to the committee to appoint a settling day for transactions in the shares of the company, and that it became necessary that the company should comply with certain rules duly issued by the committee, to the effect, first, that a settling day would be appointed, provided that no allegations of fraud be substantiated, that there had been no misrepresentation or suppression of material facts, &c. Secondly, that, previous to such application being submitted to the committee, production of the following documents should be required—the original applications for shares, together with the allotment book signed by the chairman and secretary to the company, and a certificate signed in like manner stating the number of shares applied for and unconditionally allotted, and the amount of deposits paid thereon. Averment, that the defendants conspired to deceive Z. and others, the committee for general purposes, and to induce them to appoint a settling day, and falsely

pretended to them that the number of shares of the company applied for by the public was 34,365, and the amount received on application £17,182 10s.; that 15,000 of the shares of the company had been allotted to the patentee, and that no shares of the company had been conditionally allotted; whereas no shares had been applied for by the public, the greater number of the shares had been allotted to the applicants upon condition that they should not be called on to pay for them, and whereas nothing had been received by the company upon the application for the shares; and 15,000 fully paid-up shares had not been taken by the patentee, &c.

Second count: That defendants were respectively directors, secretary, and promoters of the E. Company, Limited, and that application had been made on behalf of the company to the committee for general purposes of the Stock Exchange to order the quotation of the company in the official list of the Stock Exchange under a rule duly issued by the committee, to the effect that the committee would order the quotation of a new company in the official list, provided that the company was of *bona fide* character, &c.; that the requirements of the second of the rules mentioned in the first count had been complied with—that two-thirds of the whole nominal capital proposed to be issued (shares reserved or granted in lieu of money payments to concessionaires, owners of property, or others not being counted in such two-thirds) had been applied for and unconditionally allotted to the public—and that a member of the Stock Exchange is authorized by the company to give full information as to the formation of the undertaking, and able to satisfy the committee as to all particulars they may require. Averment, that the defendants requested a firm of stockbrokers to give the information before mentioned, and to apply to the committee to order the quotation of the shares of the company in the official list, and employed the brokers to sell 5,000 shares of the company on behalf of alleged vendors of patents, and that the defendants conspired to deceive the committee, and to induce them, contrary to the true intent and meaning of the rules mentioned in this and the first count, to order a quotation of the shares of the company in the official list of the Stock Exchange, and thereby to induce and persuade divers of the Queen's subjects, who should themselves buy and sell the shares of the company, to believe that the company was duly formed and constituted, and had in all respects complied with the rules of the Stock Exchange, so as to entitle the company to have their shares quoted in the official list. And that the defendants, in pursuance of the conspiracy, falsely pretended to Z. and others, members of the committee, that the number of shares applied for by the public, &c. (repeating the false pretences mentioned in the first count), and did thereby induce the committee to order the shares to be quoted in the official list after the 28th of May, 1874.

At the trial the jury found that the defendants were guilty of obtaining a settlement on the Stock Exchange by false and fraudulent means, and a verdict of guilty was entered:

Held, on a motion in arrest of judgment (Cockburn, C.J., doubting) that the second count was good, as it must be taken by necessary inference to allege that the object of the conspiracy was, not merely to obtain a settling day and official quotation upon the Stock Exchange, and so to induce persons to believe that the company was duly formed and constituted, but also to induce persons to act on that belief and to deal in the shares of the company:

2. *Semble*, per Cockburn, C.J., that the first count was defective, as it did not show any conspiracy to defraud the public. *Regina* v. *Aspinall*. 152, 168 *note*.

3. *Highway*. Upon the trial of an indictment for the non-repair of a highway, it appeared that the highway ran along the slope of a hill several hundred feet above the level of a valley beneath. Two landslips occurred on the slope of the hill, comprising many acres of land, and part of the highway was carried away into the valley below, and its place filled up with earth, stones and other debris. The debris was at one point twenty-five feet above, and at another two feet below, the level of the old road, and occupied the line or track of the highway. At the point where it was twenty-five feet above the level of the old road it had been ascertained by boring that, for a depth of thirty and a half feet from

the surface, there was nothing but soil, shale and stones, and that there was no trace of the old metalled road, but the line of it was known and admitted. Evidence was given that it was practicable to form a road along the old track of a similar character to the adjoining parts of the old road at a cost of £341:

Held, the court having power to draw inferences of fact, that there was no proof of such destruction of the highway as to exempt the parish from their liability to repair it. *Regina* v. *Greenhow*. 133

CUSTOM.

1. A shipowner had for several years had an account with merchants who effected for him insurances on his ships. In their accounts they charged him with the full premiums, but they had been allowed by the underwriters, and retained out of the premiums 5 per cent. brokerage and a further 10 per cent. discount for ready money, as usual on insurances. On taking the accounts in a suit respecting a mortgage on some ships the shipowner objected to allow the merchants to retain the 10 per cent.:

Held, that as these allowances were usual, and as the shipowner had never inquired on what terms the merchants effected the insurances, and appeared to have accepted their terms, he could not now raise the objection. *Baring* v. *Stanton*. 635

D.

DAMAGES.

See ADMIRALTY, 476.
INSURANCE, MARINE, 305.

DEBTOR AND CREDITOR.

See CHATTEL MORTGAGE, 864.
FRAUDULENT CONVEYANCE, 844.

DEED.

See MINES, 399.

DEMURRAGE.

1. Timber was consigned, under a charterparty made at Riga, to the Canada Dock in the port of Liverpool, a given number of days being allowed for unloading there:

Held, that, by the general law, the lay days commenced from the time the ship arrived in the dock; but that it was competent to the consignee to show, notwithstanding the plaintiff was a foreigner, that there was a custom in the port of Liverpool, that, in the case of timber ships, the lay days commenced only from the mooring of the vessel at the quay where by the regulations of the dock she was alone allowed to discharge. *Norden Steamship Co.* v. *Dempsey*. 252, 260 *note*.

See ADMIRALTY, 286.

DEVISE.

See HEIR, 512.

DIRECTORS.

1. A company mortgaged chattels to two of the directors, who furnished the secretary with the necessary particulars for entering it in the register of mortgages, and directed him to register it, but he omitted to do so. The directors put in force the powers in their mortgage and realized their security; and subsequently the company was ordered to be wound up:

Held, that as the directors had not "knowingly and wilfully authorized or permitted the omission" of the entry of the mortgage on the register, and had realized their security before the commencement of the winding-up, the liquidator could not compel them to refund the proceeds of the security. *Borough of Hackney Newspaper Co.* 751

See CRIMINAL LAW, 152.

DISCLAIMER.

See TRUSTS AND TRUSTEES, 621.

DISCRETION.

See EXECUTORS AND ADMINISTRATORS, 544.

DIVIDENDS.

See WILLS, 700.

DIVORCE.

1. In August, 1875, a wife, then aged 47, instituted a suit for a declaration of the nullity of a marriage contracted in May, 1849. There was evidence that the petitioner was *virgo intacta*, and that the respondent was incurably impotent. The petition was dismissed, the court being of opinion that there was no satisfactory explanation of the delay in taking proceedings, and that the proceedings had been taken partly in consequence of the disagreements and quarrels between the petitioner and the respondent, and not with the single object of obtaining redress for the injury done to petitioner by the respondent's incapacity. *R.* v. *R.* 445

DOMICILE.

1. In order to change his domicile of origin, a man must voluntarily fix his sole or principal residence in a country which is not his country of origin, with the intention of residing there for a period not limited as to time.

2. The domicile so acquired may be put an end to simply by abandoning it, without acquiring a new domicile of choice, and in such a case the domicile of origin reverts. *King* v. *Foxwell.* 644, 647 *note.*

DOWER.

See ELECTION, 756, 758 *note.*
LEGACY, 779.

DUPLICATE.

See WILLS, 786.

E.

EASEMENT.

See MINES, 399.
MINES AND MINERALS, 859.
WAY.

ELECTION.

1. A testator, entitled under a settlement to a life interest in certain cottages to which his wife became absolutely entitled on his death, purported to devise them to her for life, with remainder to A., who, without knowing of the settlement, sold his supposed reversionary interest to the plaintiff. The testator's widow, who took other benefits under the will, subsequently sold the cottages to a purchaser without notice of the devise. On the widow's death the plaintiff claimed compensation against her estate:

Held, that the widow had elected to take the cottages against the will, and that A. was entitled to compensation for the loss he had sustained in respect of their value at the widow's death, out of her estate to an extent not exceeding the amount of her other benefits under the will. *Rogers* v. *Jones.* 756, 758 *note.*

See LEGACY, 779.

EN VENTRE SA MERE.

See WILLS, 815.

ESTATE TAIL.

See WILLS, 119.

ESTOPPEL.

See FORMER SUIT, 717.
FRAUDS, STATUTE OF, 143.

EVIDENCE.

1. How far bill of lading conclusive, and how far may be varied by parol evidence. *The Peter der Grosse.* 452

See CARRIER, 126, 129 *note.*
MEMORANDA, 710, 715 *note.*

EXECUTORS AND ADMINISTRATORS.

1. When discretion to distribute fund creates a trust. *Pocock* v. *Attorney-General.* 544

2. Allowing to continue business, invest in stocks, etc. *Bevan* v. *Waterhouse.* 797

See LEASE 44.
FIXTURES, 44.
TRUSTS AND TRUSTEES, 621.

EXECUTORY DEVISE.

See WILLS, 119.

EXECUTORY LIMITATION.

See HEIR, 562.

EXPENSES.

See MORTGAGE, 583.

EXTINGUISHMENT.

See BONA FIDE PURCHASER, 706, 710 *note.*

F.

FACTOR.

See LIEN, 833.

FALSE IMPRISONMENT.

See ARREST, 353, 358 *note.*

FELONY.

See ARREST, 353, 358 *note.*
CARRIER, 126, 129 *note.*

FIXTURES.

1. When machinery has been annexed to the leasehold soil for the working of coal underneath, it descends with the soil to the heir of the lessee.

Per THE LORD CHANCELLOR: There is certainly no authority for saying that the executor can remove fixtures as against the heir. *Bain* v. *Brand.* 44, 61 *note.*

See FRAUDS, STATUTE OF, 131.
LEASE, 44.

FOREIGN COURTS.

See JURISDICTION, 428, 433.

FOREIGN SUIT.

See FORMER SUIT, 63.

FORGED INSTRUMENT.

1. Negligence in the custody of a draft or in its transmission by post will not disentitle the owner of it to recover the draft or its proceeds from one who has wrongfully obtained possession of it.

2. Negligence, to amount to an estoppel, must be in the transaction itself, and be the proximate cause of leading the third party into mistake, and also must be the neglect of some duty which is owing to such third party or to the general public.

3. The plaintiffs, merchants at New York, desiring to transmit £1,000 to W. & Co., of Bradford, purchased of S. & Co., in New York, a draft for that amount drawn by S. & Co., on Smith, Payne & Co., London, payable to the order of the plaintiffs on demand. The plaintiffs indorsed the draft specially to W. & Co. or order, and inclosed it in a letter addressed to them which was placed in a letter-box in their office to be posted in the usual way. The letter was stolen by one Hecht, a clerk in the employ of the plaintiffs, who forged an indorsement of W. & Co., and procured the defendants, bankers in London, to present the draft and obtain the money, which was placed by them to the account of a person acting in concert with Hecht, upon whose checks the money was almost immediately drawn out.

In an action for money had and received, the defendants, in order to show that the negligence of the plaintiffs in the custody and transmission of the draft afforded facilities for the fraud, and so estopped them from suing for the money, tendered evidence that it was an usual and almost invariable practice amongst merchants sending large remittances from abroad to send, besides the letter containing the remittance, a letter of advice by the same or the next mail. This evidence was rejected, on the ground that the alleged negligence was collateral only to the transaction giving rise to the action:

Held, that the plaintiffs' right to the draft, and to sue for the proceeds thereof in the hands of the defendants as money received to their use, was not affected by the felonious act of Hecht; and that the evidence tendered was properly rejected. *Arnold* v. *Cheque Bank.* 204, 215 *note.*

4. The plaintiff drew a check on his bankers, M. & Co., payable to order, crossed it "L. & C. Bank," and sent it for value to the payee, from whom it was stolen and his indorsement forged. It was ultimately passed to the defendant, who took it *bona fide* in ignorance of the forgery. The defendant gave it to his country bankers, and their London agents, the L. and J. Bank presented and received payment for it from M. & Co., who either did not perceive or disregarded the crossing "L. & C. Bank." On hearing it was paid the defendant gave value for it to a customer. Meanwhile the plaintiff, at the payee's request, had sent him a second check for the same amount, which was also paid by M. & Co., and the plaintiff's account was debited with both checks. The plaintiff having brought an action for the amount of the first check, for money had and received by the defendant, the jury found that all the parties concerned, except the defendant, namely, the plaintiff, M. & Co., and the payee, had been guilty of negligence with regard to the payment of the first check:

Held, that the first check had been paid by M. & Co. improperly and without authority, because they had paid it to the wrong bankers, and that the plaintiff could maintain this action against the defendant who had acquired no title to the check. *Bobbett* v. *Pinkett.* 368

FORGERY.

See FORGED INSTRUMENT, 368.

FORMER SUIT.

1. Whether a court having ample authority to decide the matter brought before it should await the expected adjudication of another tribunal having only similar authority, is merely a

question for the exercise of judicial discretion.

2. If there be any want of power in the court it may be well that the proceedings should be stayed in order that some other court which has the requisite power may adjudicate.

3. *Per* LORD SELBORNE: I am far from saying that there might not be cases in which a proceeding in a foreign court might be regarded as a satisfactory way of ascertaining the legal rights of parties; and the Scotch courts might very properly desire to ascertain the result of the foreign proceeding before determining the claim brought before themselves. But I can hardly conceive a greater miscarriage of justice than it would be, after a suit had been fought out to the end, if your Lordships were now to turn round upon a point of discretion and say the Court of Session must take into consideration what has been done in the English suit. There was no lack of materials in Scotland for the necessary purposes of justice. *Phosphate, etc.*, v. *Molleson.* 63

4. A suit was instituted in the Court of Chancery by plaintiffs on behalf of themselves and all other occupiers of lands and tenements within Epping Forest, against, amongst others, the lord of a manor within that forest and two grantees from that lord of part of the wastes of the manor. The plaintiffs claimed to be entitled to rights of common over the wastes of the manor, and alleged that the lord of the manor in question inclosed or authorized the inclosure of large portions of the waste, so as to interfere with the rights of common, and had granted other portions of the waste to persons who made similar inclosures, and that such persons were too numerous to be made parties to the suit, but were sufficiently represented by the two grantees made defendants thereto. A decree was made establishing the right of common claimed, and granting an injunction. After the Judicature Acts came into operation the same plaintiffs filed a supplemental statement of claim against another grantee from the same lord, seeking to have the benefit of the decree against him, and an injunction:

Held, on demurrer, that the defendant was bound by the decree in the suit so that he could not litigate the right of common thereby established:

5. *Held*, also, that the proceedings for enforcing the decree against him were not purely supplemental, but in the nature of original proceedings. *Commissioners of Sewers* v. *Gellatly.* 717

See JURISDICTION, 428, 433.

FRAUD.

See APPOINTMENT, 598.
BANKRUPTCY, 619.
CHATTEL MORTGAGE, 864.
CONSIDERATION, 118.
COMMERCIAL LAW, 152.
FRAUDULENT CONVEYANCE, 844.
MISTAKE, 820.

FRAUDS, STATUTE OF.

1. The tenant of premises having become bankrupt, the trustee sold the tenant's fixtures on the premises to the plaintiff, and he sold them to the defendant, the landlord. There was no agreement in writing, and the value of the fixtures was above £10. An action having been brought for the price:

Held, that the sale was not within s. 4 of the Statute of Frauds as the sale of an interest in land, nor within s. 17 as the sale of goods and chattels; and the action was therefore maintainable. *Lee* v. *Gaskell.* 131

2. The plaintiff signed a contract for the purchase of a leasehold shop from "the vendor," subject to particulars and conditions; and the auctioneer signed "as agent for the vendor." The plaintiff paid a deposit, and the vendor's solicitor forwarded to the plaintiff's solicitors an abstract of title, and in reply they wrote: "Without prejudice to any question which may arise as to the contract of purchase herein, we beg to name Tuesday next to examine abstract of title, with deeds," &c. And after examining the abstract they forwarded requisitions, writing at the foot of them, "The above requisitions are made with-

out prejudice to any question which may arise as to the contract for the purchase of the premises." The plaintiff subsequently repudiated the contract, on the ground (*inter alia*), that the contract did not disclose the name of the vendor, and brought an action to recover the deposit:

Held, without deciding whether the memorandum was insufficient under the Statute of Frauds, that the plaintiff could not recover, having chosen, knowing that the vendor's name did not appear in the memorandum, to pay the deposit and receive the abstract of title; and that the expression in the correspondence, "without prejudice to any question which may arise as to the contract of purchase," could not have been meant or understood as referring to the validity of the contract. *Thomas* v. *Brown*. 143

3. A broker acting for the plaintiff made a contract for the sale of goods to the defendant, sending a note to each party, but signing only that which was sent to the seller; he, however, entered the contract in his book in which he signed both the bought and the sold note. The defendant kept the note which was sent to him without objection until called upon to accept the goods, when he repudiated the contract, assigning for reason that the note sent to him was not signed:

Held, that the conduct of the defendant amounted to an admission that the broker had authority to make the contract for him, and consequently that his signature to the sold note bound the defendant.

4. *Held*, also, that the signed entry in the broker's book was a sufficient memorandum of the bargain to satisfy the Statute of Frauds. *Thompson* v. *Gardner*. 328, 331 *note*.

FRAUDULENT CONVEYANCE.

1. In 1858 a man, who was not then engaged in trade, and who owed no debts, made a voluntary settlement of a sum of £1,000. The trusts of the deed were, a life estate to himself determinable on bankruptcy, then a life estate to his wife for her separate use, then trusts for the children of the marriage, and an ultimate remainder to the settlor. In 1873 he for the first time engaged in trade. In 1875 he was adjudicated a bankrupt:

Held, that the settlement was void *in toto* as against the trustee in the bankruptcy. *Matter of Pearson*. 844

See CHATTEL MORTGAGE, 364.

FREIGHT.

See ADMIRALTY, 83, 286, 465, 476.

G.

GAMING.

See WAGER, 202.

H.

HEALTH.

See NUISANCE, 349.

HEIR.

1. A testator devised estates to trustees and their heirs upon trust to accumulate the rents until the expiration of the term of twenty-one years, and after the expiration thereof to stand possessed of the estates in trust for the second and every other younger son successively of his nephew W. in tail male, and failing such issue, in trust for the first and every other son of his nephew H. in tail male, with divers limitations over; and he gave a fund of personal estate to be held on similar trusts. At the expiration of the term W. and H. were both living, and each had an only son:

Held (affirming the decision of Bacon, V.C.), that until it should be ascertained whether there would be a second son of W., the rents of the real estates and the income of the personal estate

were undisposed of and belonged respectively to the heir-at-law and next of kin. *Wade-Gery* v. *Handley*. 562

See FIXTURES, 44.
LEASE, 44.

HEIRLOOMS.

1. The court has no jurisdiction to order a sale of heirlooms which are settled in strict settlement, simply on the ground that a sale would be for the benefit of all parties interested. *D'Eyncourt* v. *Gregory*. 737, 738 *note*.

HIGHWAYS.

See CRIMINAL LAW, 133.

I.

ILLEGAL CONTRACT.

See MUNICIPAL CORPORATIONS, 388, 398 *note*.

ILLEGITIMATE CHILDREN.

See WILLS, 815.

IMPROVEMENTS.

See TRUSTS AND TRUSTEES, 503.

INCOME.

See. HEIRS, 562.
LIFE ESTATE, 531.
TRUSTS AND TRUSTEES, 503, 789.
WILLS, 496.

INDICTMENT.

See CRIMINAL LAW, 152.

INFANT.

1. A recognition when of full age of a debt contracted in infancy, and a promise to pay it "as a debt of honor" when of ability, is not such "a ratification of the contract made during infancy" as is required by 9 Geo. 4, c. 14, s. 5, to charge the party. *Maccord* v. *Osborne*. 197, 201 *note*.

INJUNCTION.

1. Where the defendants, owners of a public building, have contracted with the plaintiff, that he, renting a stall from them, shall have the exclusive right to exhibit and sell certain specified classes of goods, an injunction will lie against the defendants for permitting the exhibition and sale by other renters of stalls within the building of goods so specified. *Altman* v. *Royal Aquarium Society*. 499

See FORMER SUIT, 63.
MINES AND MINERALS, 859.

INSURANCE, LIFE.

See NOVATION, 563, 566.

INSURANCE, MARINE.

1. The purchaser of a "cargo" of rice which is to be loaded on board a ship expected to arrive at a certain port, where it is to load for a voyage, he agreeing to pay a sum certain "per cwt., cost and freight," has no insurable interest in the purchase (*diss.* Lord O'Hagan and Lord Selborne), so that should the rice put on board be lost before the loading is completed, he cannot recover on a policy of insurance effected on goods in the vessel.

2. A. was a merchant in London, he entered into a contract for the purchase of rice. The contract consisted of a bought note, which was in the following terms: "Bought for the account of A., of B. S. & Co., the cargo of new crop Rangoon rice, per Sunbeam, 707 tons register, at 9*s.* 1½*d.* per cwt., cost and freight. Payment by sellers' draft on purchaser at six months' sight, with documents attached." A. insured the cargo "at and from Rangoon." The ship arrived at Rangoon in due time. The loading, by bags, of the rice, was rapidly proceeded with; by far the larger portion of the cargo was on board, the remaining bags of rice being in lighters alongside, when the vessel, unexpectedly, sank. The captain afterwards signed and delivered bills of lading, and the purchaser then accepted the seller's drafts, which were duly honored. In an action as for a total loss, the Court of Common Pleas held that A. was entitled to recover. The Exchequer Chamber (*diss.* Quain, J.) reversed this decision on the ground that A. had no insurable interest when the loss occurred. On appeal to this House, the Lords were equally divided, and so the judgment of the Exchequer Chamber stood affirmed. No costs were given on the affirmance.

The jury had found, in favor of A., that there was a loss by the perils insured against. This finding was adopted in both courts. On appeal that decision was affirmed with costs. *Anderson* v. *Morice.* 1

3. Where a policy of marine insurance is made by one person on behalf of another without authority, it may be ratified after the loss of the thing insured by the party on whose behalf it is made, though he know of the loss at the time of such ratification.

4. Where there was a valued policy on "freight:"

Held, that the rule that the valuation in a valued policy is conclusive did not prevent the court from looking into the elements of which the valuation was made up to ascertain whether the freight intended to be so valued was the full freight, or the freight after deducting certain advances made against freight by the charterers' agents to the captain, such question becoming material for the purpose of ascertaining whether the shipowner was interested in the whole of the subject-matter of insurance, and whether to any extent the loss had been satisfied under another policy of insurance effected by the charterers on the said advances against freight. *Williams* v. *North, etc.* 305, 317 *note.*

INTENT.

See WATER AND WATERCOURSES, 383.

J.

JUDGMENTS IN REM.

See JURISDICTION, 428, 433.

JURISDICTION.

1. A ship sailing under a foreign flag, and belonging to a foreign company established abroad, came into collision with, and did damage to, an English ship on the high seas. The owners of the English ship applied for leave to issue a writ of summons, of which notice should be given out of the jurisdiction, claiming compensation for the damage, against the foreign company. Leave refused.

2. The phrase, "within the jurisdiction," used in the Judicature Act, 1875, sch. 1, Order XI, Rule 1, means territorial jurisdiction. *Matter of Smith.* 422

3. A collision occurred on the high seas between two vessels, the H. W. and the C. C., and to recover for the damage sustained therein the owner of the H. W. instituted a cause of damage *in rem* in the High Court of Admiralty of Ireland against the C. C., and caused her to be arrested in Ireland. The owners of the C. C. obtained the release of the vessel on bail, and instituted a cross suit against the H. W. Subsequently the C. C. came to England, and was there arrested in an Admiralty action *in rem* at the suit of the owner of the

H. W., who claimed in such action to recover damages in respect of the same collision. Whilst the proceedings in Ireland were still pending, the owners of the C. C. applied that the action in this court should be dismissed with costs:

The court ordered the vessel to be released, and all proceedings in the action to be stayed. *The Catterina Chiazzare.* 428

4. The owners of the ship D. instituted proceedings in a foreign court against the owner of the ship E. in respect of a collision between the two ships. The owner of the E. instituted a cause of damage in this country in respect of the same collision against the ship D. The owner of the E. neglected to enter an appearance in the foreign court, but instituted a cross cause in the foreign court against the owners of the D. In both suits in the foreign court the owners of the D. obtained judgment by reason of the defaults of the owner of the E. The owners of the D., having appeared in the cause instituted in this country, pleaded the foreign judgments in bar. The court in this country, having decided on the merits in favor of the owner of the E., refused to give effect to the defence of *res judicata*. *The Erminia Foscolo.* 433

See FORMER SUIT, 63.
HEIRLOOMS, 737, 738 *note.*

L.

LACHES.

See DIVORCE, 445.

LANDLORD AND TENANT.

See FRAUDS, STATUTE OF, 131.
INJUNCTION, 499.
LEASE, 44.

LEASE.

1. A lease in Scotland is heritable, not movable or personal, as in England, but descending to the heir of the lessee. Whether the lease be in perpetuity or for a term of years the descent will be the same. *Bain* v. *Brand.* 44

See AGREEMENT, 232, 238 *note.*

LEGACY.

1. The rule that legacies followed by a gift of real and personal residue in one mass are charged on the real estate, applies although preceded by a direction that the debts and legacies shall be paid by the executors.

2. A testatrix by her will directed her debts and funeral and testamentary expenses, and the legacies thereby bequeathed, to be paid by her executors thereinafter named, and after bequeathing specific and pecuniary legacies and making a specific devise, she gave the residue of her real and personal estate to A. and B. upon certain trusts, and appointed A. and C. executors:

Held, that the legacies were charged on the residuary real estate of the testatrix. *Matter of Brooke.* 734

3. A widow is not entitled to priority over other legatees in respect of an annuity bequeathed to her by her husband, "in lieu, bar, and satisfaction of dower," where the only real estate of the testator was conveyed to him with a declaration against dower.

4. Where both annuities and legacies are charged upon real estate, although the annuitants have power of distress and entry, the annuities will not have priority over the legacies. *Roper* v. *Roper.* 779

5. When duplicated and when not. *Hubbard* v. *Alexander.* 786

See WILLS.

LEX LOCI.

See JURISDICTION, 428, 433.
LIMITATIONS, STATUTE OF, 512.

LIBEL.

1. To justify the publication in a newspaper of defamatory comments,—apart from reports of what passes in courts of justice,—it must be shown either that the person of whom the defamatory matter is written was a person whose position and character are of general interest to the whole country, or that the subject-matter dealt with is one of general interest to the whole community. It is not enough to show that the individual fills a public character of a limited kind and in a limited district, or that the subject-matter dealt with is of interest only to a small portion of the public, or to the public in a limited district.

2. The defendants, the proprietors of a newspaper, published a report of the proceedings at a meeting of the board of guardians of a provincial union, containing false and defamatory matter reflecting upon the medical officer of the union workhouse:

Held, not privileged by the occasion, though the report was admitted to be *bona fide* and a correct account of what passed at the meeting. *Purcell* v. *Sowler*. 332

See SLANDER, 176, 183 *note*.

LIEN.

1. S., who had for many years traded as a timber merchant in his own name, entered into an agreement with F. & Co., who were also timber merchants, to carry on his business thenceforth as their agent at a remuneration by way of a share of profits. The business was thenceforth carried on under this agreement, but in the name of S. as before. S. dealt with the timber in his possession as if he were the absolute owner of it (except as between himself and F. & Co.), and there was nothing done to inform the outside world of the change which had taken place. In the course of the business F. & Co. drew bills on S., which he accepted in his own name to be protected by F. & Co. Both F. & Co. and afterwards S. filed liquidation petitions.

Before S.'s liquidation, F. & Co.'s trustee demanded the timber in his hands, which was refused:

Held, that to the extent of the current bills S.'s estate had a lien on the timber.

2. *Semble*, the reputed ownership clause applies to goods in the hands of a factor, unless the relation of principal and factor is notorious. *Matter of Fawcus*. 833

See ADMIRALTY, 286.
ATTORNEYS, 323, 328, 529.
BILLS OF LADING, 632.

LIFE ESTATE.

1. Testatrix gave a sum of £20,000 stock to be laid out by the trustees of her will in the purchase of a government annuity in the name of and for the benefit of her godson for the term of his natural life; and directed that the annuitant should not be entitled to have the value of his annuity in lieu thereof, and that if he should sell his annuity the same should cease and form part of her residuary estate. The trustees purchased an annuity in the name, and payable during the life, of the annuitant, and he entered into a contract to sell the same:

Held, that the annuitant was absolutely entitled to the annuity, and that he could make a good title to it to the purchaser. *Hunt-Foulston* v. *Furber*. 510

2. A testator gave to his trustees a tithe rent charge held under an ecclesiastical lease for twenty-one years, which was in practice renewed every seven years on payment of a fine, upon trust to renew out of the proceeds, and to apply the surplus in a certain way during the life of his wife, and directed that after her death it should form part of his residuary estate. He gave his trustees power at any time to sell the leasehold interest.

The lease having ceased to be renewable:

Held, by Malins, V.C., that the persons interested during the life of the widow were entitled to receive the rent charge free from any deductions for raising a renewal fund; and that a renewal fund which had been raised out of the income, but could not be applied for renewal, must be paid to the persons entitled to the income:

3. *Held*, on appeal, that the leasehold interest ought to be sold and the proceeds invested, and only the income of this fund and of the renewal fund applied as income. *Maddy* v. *Hale*. 531

See HEIR, 562.
HEIRLOOMS, 737, 738 *note*.
SETTLEMENT, 810.
TRUSTS AND TRUSTEES, 641, 789, 797.
WILLS, 119, 770, 779 *note*.

LIMITATION OF ESTATE.

See WILLS, 568.

LIMITATIONS, STATUTE OF.

1. By will in 1810, B. devised to trustees his estate in Jamaica to hold to the use that H. should, out of the rents and profits, receive for life an annuity payable quarterly for her separate use, with powers of distress and entry and perception of the rents and profits, and after her decease to the use that the trustees should pay the annuity unto her children, as she should appoint, for their lives.

The testator gave other annuities out of the rents and profits of the same estate, and gave the estate to the use of his son for life, with remainders over. The last payment on account of H.'s annuity was in 1842. H. died in 1853. She made an appointment, and arrears were due to her and her appointees. The estate was for some years a waste, and no rents and profits were received till 1870, and when received they were paid into court:

Held, that the Statute of Limitations (3 & 4 Will. 4, c. 27) did not apply to Jamaica, and that the legal personal representative of H. was entitled to be paid the arrears due to her. *Pitt* v. *Lord Dacre*. 512

LIS PENDENS.

See JURISDICTION, 428, 433.

M.

MARRIED WOMEN.

See WILLS, 700.

MASTER AND SERVANT.

1. The defendants, who were colliery owners, commenced sinking a shaft, for which purpose they employed workmen (amongst whom was the plaintiff) and a steam engine with a man to drive it. Having proceeded some depth, the defendants contracted with one W. to complete the work. Under this contract W. was to employ and pay the workmen (including the plaintiff), and the defendants were to provide steam power and to pay the engineer's wages; the engineer, however, to be under the orders and control of W.

Through the negligence of the engineer, the plaintiff sustained an injury whilst at work at the bottom of the shaft:

Held, that, inasmuch as the plaintiff and the engineer were engaged in one common employment under the orders and control of W., the contractor, the defendants were not responsible for the engineer's negligence, notwithstanding that his wages were paid by them. *Rourke* v. *White Moss, etc.* 191

See AGREEMENT, 224, 228 *note*.
NEGLIGENCE, 72, 82 *note*.

MEMORANDA.

1. Where an entry in the handwriting of a deceased person is *prima facie* against his interest, it is admissible as evidence for all purposes, irrespective of its effect or value when received.

2. The following entry in the handwriting of a deceased person. "J. W. paid me three months' interest," which was followed by other entries pointing to a loan to J. W.:

Held to be admissible as evidence, whether or not the effect of it when admitted would be to establish the ex-

istence of a debt due to the testator. *Witham* v. *Taylor*. 710, 715 *note*.

MINES AND MINERALS.

1. The owner in fee of an estate granted away a portion of it, which ultimately became the property of the plaintiff, but reserved a rent charge (subsequently redeemed), and also the minerals under the land so granted and the right to work them, paying compensation for all damage that should be done thereby to the erections on the land. The grantee (for the better securing of the rent charge) covenanted to build a mill on the land granted to him. The owner in fee afterwards granted to the defendants' predecessor in title the minerals, rights, and liberties so reserved, and also the other and adjacent portion of the estate. The defendants, who took with notice of the agreement as to the payment of compensation, worked the minerals under the plaintiff's land, and also the minerals under their own land, and by the operation of one or other of these workings, or by their joint operation, let down the surface of the plaintiff's land, and so injured the mill which had been built there in accordance with the covenant:

Held, affirming the decision of the court below, first, that the right to work the subjacent mines being subject to the condition of paying compensation, the plaintiff could maintain an action for the injury done to the mill by the working of those mines.

2. Secondly, that if the injury arose from the working of the mines under the adjacent lands, or from the combined effect of working those mines and the subjacent ones, the plaintiff was still entitled to recover. *Aspden* v. *Seddon*. 399

3. In an ordinary copyhold manor the estate of the copyholder is in the soil throughout except as regards trees, mines, and minerals, the property in which remains in the lord. When the lord has removed minerals the space left belongs to the copyholder. The right of the lord is not like that of a vendor of freeholds who has reserved mines, and remains the owner of the vacant space from which minerals have been removed.

4. In a Crown manor, where the Crown and its lessees were by custom entitled to enter on the land for the purpose of working the minerals, the defendant, the lessee of the Crown mines, who was also lessee of the S. mine outside the manor, claimed a right to use a crut or underground way beneath the land of the plaintiffs, who were copyholders of part of the manor, for the purpose of conveying minerals from the S. mine to the deep pit by which the manorial mines were worked, and thence by a branch railway constructed by the defendant over part of the same copyhold to the main line:

Held, that such user was a trespass, and that, no case of acquiescence on the part of the plaintiffs or their predecessor in title having been established, they were entitled to an injunction to restrain the defendant from carrying the S. minerals over or under their copyhold land. *Eardley* v. *Granville*. 859

See WAY, 847.

MISDEMEANOR.

See ARREST, 358, 358 *note*.

MISTAKE.

1. The court will not in all cases relieve against a payment of money under mistake of law.

2. An executor, acting on the advice of counsel on the construction of a will, proposed to divide in certain proportions a fund between two legatees. One of the legatees being dissatisfied took the opinion of counsel, which agreed with the former opinion. The executor then divided and paid over the fund in accordance with the opinions. Two years afterwards the dissatisfied legatee filed a bill against the executor and the other legatee, alleging that the will had been wrongly construed, and claiming repayment from the other legatee:

Held (affirming the decision of Hall,

V.C.), that the suit could not be maintained. *Rogers* v. *Ingham*. 552, 559 *note*.

3. The defendant contracted to buy from the plaintiff freeholds and leaseholds under the condition that he should assume that E. M., who died in 1841, was seised in fee of the freeholds, and should not "require the production of or investigate or make any objection in respect of the prior title" thereto.

He accepted the title, and before completion contracted to sell the lands, with a farm of his own adjoining the freeholds, to a sub-purchaser, who discovered, from an inclosure award prior in date to 1841 (as to the effect of which both the plaintiff and defendant had been under a misapprehension), that the freeholds had never belonged to E. M., but at the date of the contract belonged to the defendant himself in fee, subject to a leasehold interest in the plaintiff.

The defendant then refused to complete, and the plaintiff filed her bill for specific performance, stating that she too had discovered that part of the lands she had contracted to sell as leaseholds belonged to her in fee simple, and offering mutual waiver or compensation:

Held, that the defendant was not precluded by the condition or the acceptance of title from taking the objection, and that the court could not decree specific performance; but that, although there was no fraud, yet, there being a common mistake, the defendant was entitled to an inquiry as to the title to the freeholds at the date of the contract.

4. Observations upon the authorities as to conditions restricting investigation of title, and upon *Bingham* v. *Bingham*.

5. *Semble*, the court will, even in the case of a completed contract, give relief against a common mistake without fraud. *Jones* v. *Clifford*. 820

MONEY HAD AND RECEIVED.

See CONSIDERATION, 113.
FORGED INSTRUMENT, 204, 215 *note*.

MORTGAGE.

1. Under agreements made between a company and G., from whom the company had previously bought its works, G. was to advance money to the company, and all moneys due to the company were to be received by G., who was to apply these moneys and also the money to be advanced by him in paying wages and salaries and other outgoings for the business of the company, and subject thereto was to repay himself. An order was made for winding up the company, under which G. and the liquidators, with the sanction of the Vice-Chancellor, made an agreement for an advance by G. of further sums on similar terms. G. advanced money for the payment of rent, rates, wages, and outgoings: a large balance remained due to him. The leasehold property, machinery, and plant of the company were sold by the liquidators:

Held, varying the order of Malins, V.C., that the costs of carrying on the business were not payable out of the mortgaged property in priority to debentures as costs of preservation, and that (subject to the costs of realizing the property) the fund belonged to the debenture holders in priority to the claims of G. or the liquidators for the costs so incurred. *Matter of Regent's Canal Ironworks*. 583

See DIRECTORS, 751.

MUNICIPAL CORPORATIONS.

1. By the Metropolis Local Management Acts, 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77, the costs of paving a new street, under the compulsory powers of the former act, are payable by the owners of the houses forming and of the land abutting upon such street, and are to be apportioned by the vestry or district board of works. By the interpretation clause of the latter act the expression "new street" is to include a part of any such street.

Buildings and land belonging to the defendants abutted upon a new street which the vestry directed to be paved over half its breadth only; the part paved being that nearest the defendants' premises. The vestry appor-

tioned the whole cost of the paving upon the houses forming the defendants' side of the street, omitting those on the other side:

Held, that the apportionment was invalid, and that the owners of the houses on both sides of the street ought to have been charged. *Mile End* v. *Whitechapel*. 114, 118 *note*.

2. By the Public Health Act, 1848, s. 69, "in case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the local board of health, such board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice."

The respondents' premises were divided from D. street by a small stream, but by two bridges over the stream their premises were connected with it; by means of gates they could effectually close all communication. One of the bridges had been moved and reinstated by the respondents. The principal outlet from their premises led into W. Street:

Held (per Grove and Field, JJ.) that the respondents' premises fronted and abutted upon D. street within the meaning of the foregoing enactment.

3. Per Cleasby, B., hesitating, that the premises adjoined D. Street. *Wakefield, etc.*, v. *Lee*. 341, 348 *note*.

4. 25 & 26 Vict. c. 102, s. 52, enacts: "Where any sewer shall . . . . be constructed by any . . . . district board in or for the drainage of any new street . . . . the expense . . . . shall be . . . . defrayed by the owners of such street . . . . and of the land bounding or abutting" thereon. Sect. 53 enacts: "Where any sewer shall be constructed by any . . . . district board in a street in which previously to such construction there had been no sewer, or only an open sewer, but where sewers rates have been levied previously to such construction, the expense . . . . shall be . . . . defrayed in part only by the owners of the houses situate in and of the land bounding and abutting on such street respectively . . . . and the residue of such expenses shall be defrayed by the . . . . district board out of sewers rates levied in their . . . . district." By s. 112 "new street" includes streets to be formed after the 7th of August, 1862. The appellant was the owner of a piece of land within the respondents' district, upon which streets had been laid out since the 7th of August, 1862; certain building land not belonging to him bounded and abutted upon the ends of all the streets except one, which terminated at a cemetery. The respondents laid down sewers in the streets and apportioned the whole of the cost between the appellant, his tenants, and the owners of the cemetery. Sewer rates had for many years been levied in respect of the houses upon the appellant's land, although no sewer had previously existed in the streets thereon:

Held, that the word "street" in s. 53 included "new streets" as defined by s. 112, as well as old streets, that s. 52 did not apply, and, therefore, that the apportionment was invalid, as it did not provide that a portion of the cost of the sewers should be defrayed by the respondents out of the sewers rate levied in their district:

5. *Semble*, that even if s. 52 had been applicable, the apportionment would have been invalid, since it did not charge any portion of the cost of the sewers upon the owners of the building land bounding and abutting upon the ends of the streets. *Sheffield* v. *Fulham Board*. 375

6. The respondent, within the limits of the Metropolis Management Acts, and with the sanction of the Metropolitan Board of Works, constructed a sewer for the drainage of the M. road, in which he owned certain houses, and which was a "new street" within the meaning of the above mentioned acts. Afterwards the appellants took up the sewer constructed by the respondent, and in place thereof laid down another for the drainage of the neighborhood:

Held, that the respondent was not liable to pay any portion of the cost of the sewer laid down by the appellants. *Fulham District* v. *Goodwin*. 379

7. The disqualification, under s. 28 of 5 & 6 Wm. 4, c. 76, of any person who has

any interest in a contract with the council of the borough, to be elected or be an alderman or councillor of the borough, applies only during the continuance of the contract. So that by becoming interested in such a contract an alderman or councillor does not cease to be qualified or become disqualified within the meaning of s. 53, so as to incur penalties for acting after the termination of the contract. *Lewis* v. *Carr*. 388, 398 *note*.

N.

NAVIGABLE RIVER.

See WATER AND WATERCOURSES, 383, 387 *note*.

NEGLIGENCE.

1. Though a plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident which is the subject of the action, yet, if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.

2. A railway company was in the habit of taking full trucks from the siding of a colliery owner, and returning the empty trucks there. Over this siding was a bridge eight feet high from the ground. On a Saturday afternoon, when all the colliery men had left work, the servants of the railway ran some trucks on the siding. All but one were empty, and that one contained another truck, and their joint height amounted to eleven feet. On the Sunday evening the railway servants brought on the siding many other empty trucks, and pushed forward all those previously left on the siding. Some resistance was felt, the power of the engine pushing the trucks was increased, and the two trucks, the joint height of which amounted to eleven feet, struck the bridge and broke it down. In an action to recover damages for the injury, the defence of contributory negligence was set up. The judge at the trial told the jurors that the plaintiffs must satisfy them that the accident happened solely through the negligence of the defendants' servants, for that if both sides were negligent, so as to contribute to the accident, the plaintiffs could not recover:
Held, a misdirection, and a new trial ordered. *Radley* v. *London, etc.* 37

3. Where a ship is under the compulsory charge of a licensed pilot the owners are not responsible for damage occasioned by his fault or incapacity; although they must meet and rebut any relevant allegation of negligence on their own part.

4. *Per* LORD CHELMSFORD: Under the Merchant Shipping Act, 1854, where shipowners have proved fault on the part of the pilot sufficient to cause, and in fact causing the calamity, they must be held to have satisfied the condition on which their exemption from liability depends; and they are not to be called upon to adduce proof of a negative character to exclude the mere possibility of contributory fault. But if, in course of the evidence, certain acts or omissions on the part of the crew come out, it will then be incumbent on the owners to show satisfactorily that those acts or omissions in no degree contributed to the damage.

5. *Per* LORD SELBORNE: When it is proved that a qualified pilot was acting in charge of the ship, that that charge was compulsory, and that it was the pilot's fault or incapacity which occasioned the damage; the burden of proving the defenders' contribution to the loss is cast on the pursuers. The defenders are not obliged to exonerate themselves by indefinite negation. They are, however, bound to rebut evidence actually brought against them of contributory negligence. *Clyde, etc.*, v. *Barclay*. 72, 82 *note*.

See ADMIRALTY, 413, 450, 465.
FORGED INSTRUMENT, 204, 215 *note*.
MASTER AND SERVANT, 191.

NEWSPAPER.

See LIBEL, 332.

NON-RESIDENT.

See DOMICILE, 644, 647 *note*.

NOTICE.

See AGREEMENT, 224, 228 *note*.

NOVATION.

1. By the deed of settlement of the R. N. Society, it was provided that the funds and property of the society should alone be answerable for claims on the society, and there were provisions enabling the society to make over its business to another company. The society granted an annuity to D. by a deed executed by three directors, which declared that the stocks and funds of the society should during the life of D. be liable to pay the annuity. Some years after this the R. N. Society made over its business to the E. Society in manner authorized by the deed of settlement. Both societies being under winding-up, D. claimed against the R. N. Society:

   Held, that the omission in the annuity deed of any express reference to the deed of settlement did not distinguish the case from *Hort's Case*, and that D. could only claim against the E. Society. *Dowse's Case*. 563.

2. M. effected a policy upon his life with the B. N. Association. The B. N. Association subsequently was amalgamated with the E. Society, and ceased to carry on business. Some time afterwards a memorandum under the seal of the E. Society, and signed by two of its directors, was indorsed on the policy, declaring that the funds of the E. Society should be liable for the payment of the policy money, provided the future premiums were paid to the E. Society. The subsequent premiums were accordingly paid to the E. Society:

   Held, that there was a complete novation, and that on the winding-up of the two companies, M. had no right of proof against the B. N. Association. *Miller's Case*. 566

NUISANCE.

1. The appellants, who were the urban sanitary authority of S., deposited in a field ashes and refuse collected in S., in order that the same might be removed by certain farmers, with whom they had contracted for the purchase thereof: the appellants were not the owners or tenants of the field, and they exercised no control over the ashes and refuse after the same were deposited: the deposit formed a nuisance. An order was made under the Public Health Act, 1875, s. 96, by justices against the appellants, for the abatement of the existing nuisance and for the prohibition of its recurrence:

   Held, that so much of the order as directed an abatement was bad, for it prescribed an act, the execution of which might involve the committal of a trespass; but that so much of the order as prohibited a recurrence was good, for it was the appellants' act which created the nuisance. *Mayor, etc.*, v. *Rural, etc.* 349

See WATER AND WATERCOURSES, 383, 387 *note*.

O.

OFFICER.

See ARREST, 353, 358 *note*.

ONUS.

1. Where bill of lading states that weight, contents and value unknown. *The Peter der Grosse*. 452

See CARRIERS, 126, 129 *note*.

P.

PAID JUDGMENT.

See BONA FIDE PURCHASER, 706, 710 *note*.

PAID MORTGAGE.

See BONA FIDE PURCHASER, 706, 710 *note*.

PAROL EVIDENCE.

See EVIDENCE, 452.

PARTIES.

See FORMER SUIT, 717.

PARTITION.

1. A power of exchange of lands is properly executed by a partition.

Accordingly, where an undivided moiety of lands was vested in A., B., and C., as trustees of a settlement which expressly authorized a partition, and the other moiety was vested in D., E., and F., as trustees of a settlement, with power to sell, dispose of, convey, and assign the said hereditaments for such a price in money, or for such an equivalent or recompense in lands and hereditaments as to the trustees should seem reasonable, and for that purpose to revoke the old uses and to limit other uses and trusts, and a partition deed, purporting to be in exercise of the said powers, was executed by the trustees of the two moieties:

Held, that the partition was properly effected by D., E., and F., under their power.

2. *Semble*, a partition between any number of persons might properly be effected under a similar power.

3. The *dictum* in Sheppard's Touchstone, that "joint tenants, tenants in common, and coparceners cannot exchange the lands they do so hold with another before they have made partition"—questioned. *Matter of Frith.* 724

PATENT.

1. In 1865, letters patent for improvements in the construction of skates were granted to the agent of the alleged inventor, who was resident in America, and to whom they were afterwards assigned. Two years previously, an American work containing a brief description of the invention, and five weeks previously, a book of illustrations containing a drawing of it, were sent to the library of the Patent Office in London:

Held, that the drawing was not so published that it could be referred to on the issue of novelty.

2. Sufficiency of the specification and of the description relied on as an anticipation considered.

3. Requisite amount of utility considered. *Plimpton* v. *Malcolmson.* 649, 697 *note*.

See CONSIDERATION, 118.

PAYMENT.

See SALE, 841.

PILOT.

See NEGLIGENCE, 72, 82 *note*.

POSTHUMOUS CHILDREN.

See WILLS, 516.

POWER.

1. Under an exclusive power to appoint to children, the children being entitled in default of appointment in equal shares, the donee, by will, appointed the whole fund to trustees, upon trust as to £1,200, to pay the income to one of her children, J., for life, and after his death, for his children; and if J. should die without leaving children who should attain vested interests, then that the £1,200 should be "added to and form part of the residue of" the trust estate. The trusts of the residue

were in favor of daughters for life with testamentary powers. J. died leaving children.

It being admitted that the gift to J.'s children was excessive:

Held, that on J.'s death the £1,200 was not undisposed of, but was well appointed by the residuary gift. *Matter of Meredith's Trusts.* 802

See APPOINTMENT, 598.
BONA FIDE PURCHASER, 706, 710 *note.*
PARTITION, 724.
WILLS, 700.

PRESUMPTION.

See CARRIERS, 126, 129 *note.*
ONUS, 452.

PRINCIPAL.

See LIFE ESTATE, 510, 531.
TRUSTS AND TRUSTEES, 503, 797.
WILLS, 496.

PRINCIPAL AND AGENT.

1. B., W. & Co., who had contracted with a colliery company for 10,000 tons of coal to be delivered over a period of three months at a spout on the Tyne, "the turn to be mutually agreed upon," proposed to charter a foreign ship for the conveyance of 29 keels to Elsinore, and tendered to the captain a charter-party which stipulated for demurrage in unloading the ship, but made no provision for detention in loading her. The captain declined to sign such a charter, without an assurance that there should be no undue detention of his ship; and thereupon B., W. & Co. obtained from the defendant (who was a clerk employed by several colliery companies to arrange the turns for loading) the following undertaking,—

"I undertake to load the ship Der Versuch, 29 keels, with Bebside coals in ten colliery working days, &c. On account of Bebside Colliery, W. S. Hoggett."

This memorandum (which made no mention of the person contracted with) was communicated by the charterers to the captain of Der Versuch, who thereupon accepted the charter.

The vessel being detained in loading beyond the stipulated ten days, the captain called upon the defendant to pay him £45, for demurrage. The defendant repudiated all liability, but ultimately offered to pay the captain £20. The defendant had no notice of the charter. In an action by the captain to recover £45 for demurrage from the defendant:

Held, that, upon these facts, a jury were warranted in finding that the undertaking to load within ten days was a contract between the captain and the defendant; that there was sufficient consideration for it; and that the contract was with the defendant personally, and not as agent. *Weidner* v. *Hoggett.* 169, 175 *note.*

2. An indorsement of a check "per procuration" or "as agent," purports to be an indorsement by the payee within 16 & 17 Vict. c. 59, s. 19, so as to protect the banker who has paid it, though the person by whom such indorsement is actually made has no authority to indorse.

3. K., an agent of the plaintiffs, having authority to sell goods for them and to receive payment in cash or by check, but having no authority to indorse checks, received from the defendants a check on their bankers drawn payable to "S. & Co. (the name of the plaintiffs' firm) or order," and fraudulently indorsed it "S. & Co., per S. K., agent," and misappropriated the proceeds. The bankers having paid the check and returned it to the defendants and charged the amount to their account:

Held, that such payment by the bankers was a payment within the protection of the statute, and that the plaintiffs could not sue the defendants either for the price of the goods or for an alleged conversion of the check. *Charles* v. *Blackwell.* 184

4. D., the managing owner of a ship, through the plaintiffs, his agents at Constantinople, sold her to the Turkish Government, and received a bill upon the Oriental Bank in London for the amount of the purchase-money, which bill was duly paid. D. had no express authority at the time from the defendants (who were the owners of 23/64ths

of the ship) to sell her, but the latter knew that a sale was contemplated; and, after the sale, they executed a power of attorney, reciting that they had agreed to sell the vessel to the Turkish Government, and had actually received the purchase-money, and empowering the plaintiffs to transfer their respective shares and to hand over the vessel to the purchasers. The defendants afterwards received from D. (or settled in account with him) the value of their respective shares:

Held, that the jury were warranted in finding that the defendants had authorized the sale of the ship by D., or had by their subsequent ratification so adopted his act as to render them jointly liable to the plaintiffs for the commission due to the latter on the sale.

5. *Held* also, that the position of the defendants was not so altered by the fact of the plaintiffs having drawn upon D. a bill at three months' date for the amount of the commission, as to release the former from liability upon the dishonor of the bill. *Keay* v. *Fenwick*. 294

6. Fruit brokers in Liverpool gave a fruit merchant the following sold note: "We have this day sold to you on account of James Morand & Co., Valencia, 2,000 cases Valencia oranges, of the brand James Morand & Co., at 12*s*. 9*d*. per case free on board, ..." and signed it without any addition. The purchaser having brought an action against the brokers for non-delivery of the oranges:

Held, reversing the decision of the Exchequer Division, that the words "on account of James Morand & Co." showed an intention to make the foreign principals, and not the brokers, liable, and that the brokers were not liable upon the contract. *Gadd* v. *Houghton*. 361

See CUSTOM, 635.
FRAUDS, STATUTE OF, 328, 331 *note*.
INSURANCE, MARINE, 305.
LIEN, 833.
MASTER AND SERVANT.
PARTITION, 724.

PRINCIPAL AND SURETY.

1. N. was indebted to the plaintiffs, and by deed agreed, first, to pay them £3,400 on the 15th of February, 1874; secondly, within a certain time after the allotment of shares in a company to which he was about to assign his business, to transfer to them shares in it to the nominal value of £6,000, and redeem them at par within twelve months from the 1st of January, 1874; and, fourthly, it was agreed between him and the plaintiffs that the book debts due to him, to the nominal amount of £8,000, should be collected and one-half paid to the plaintiffs, to be applied towards redemption of the shares, and when they had received a sum equal to, or a multiple of, the amount of a share, they were to deliver to him shares at par equivalent to the amount so received. The defendant guaranteed the performance of this agreement by N. so far as concerned the redemption of the shares of the value of £6,000. Subsequently an arrangement was made between the plaintiffs and N., by which, for an equivalent in shares and cash, they released to him their interest in the book debts, that he might dispose of them to the company. The defendant having been sued on his guarantee for a deficiency of £2,250 in the amount of shares:

Held, that the new arrangement was such a variation of the rights of the defendant as surety as to discharge him. *Polak* v. *Everett*. 104

2. Although where one enters into a bond as surety for the performance by another of two things which are separate and distinct, a subsequent alteration of the principal's contract as to one of them without the surety's consent does not release the surety from his contract of suretyship as to the other, yet, where the contract is one entire contract for the performance by the principal of two or more things at different times, if by any dealing with the principal without the consent of the surety the latter is discharged as to one of them, his liability as surety is altogether released.

3. When once a surety is relieved from the obligation which he has undertaken, that obligation cannot be renewed by any subsequent act to which he is no party.

4. D. contracted with a gas company to take from them tar and ammoniacal liquor, and to pay for each month's supply within the first fourteen days

of the ensuing month after the account rendered, "unless the company should by writing signed by their secretary allow a longer time for payment." The defendant became surety for the performance of the contract by D.

On the 3d of August an account was delivered for the July supply; and after the fourteen days had expired, viz., on the 21st, the secretary of the company, without the knowledge of the surety, sent D. a letter inclosing a promissory note at a month for the amount, with a request that he would sign and return it. D. signed the promissory note and returned it to the secretary, who kept it:

Held, that, assuming this to be a giving of time "by writing signed by the secretary," within the meaning of the agreement, being after breach the surety was released; and that, once released, he was not liable in respect of debts contracted in respect of subsequent months' supplies. *Croydon, etc.*, v. *Dickinson.* 261, 272 *note.*

5. The creditors of a firm of liquidating debtors agreed to a scheme of arrangement under the 28th section of the Bankruptcy Act, 1869, which was sanctioned by the court. Under this scheme the assets were transferred to a company, who were to carry on the business, and debentures were issued to the creditors for the amount of their proved debts, which were to be payable out of the surplus profits, after meeting certain prior charges. Among the creditors was C., who had accepted accommodation bills to a large amount for the firm, and who afterwards himself filed a liquidation petition, and paid his creditors a composition of 4*s.* in the pound. The holders of the bills thus accepted proved against C.'s estate, and received their composition amounting altogether to about £32,000. They also proved against the estate of the liquidating firm under the scheme of arrangement. Some of them received the composition before proving, and consequently only proved for 16*s.* in the pound; the others proved for the whole amount. C. then claimed to stand in the place of the bill holders as a creditor of the liquidating firm to the extent of what he had paid under the composition, and to have debentures issued to him to the nominal amount of £32,000 in their stead. His claim to stand in the place of those bill holders who had received their composition before proving under the scheme of arrangement to the extent of 4*s.* in the pound was allowed; but as to the others who had proved for the whole amount:

Held, first, that the debentures were not issued to the creditors in satisfaction of their debts, but in substitution for the dividends which under a bankruptcy would have been payable on them:

6. Secondly, that the scheme of arrangement made no difference in the relation between C. and the liquidating firm, namely, that of surety and principal debtor, and therefore that he had no equity to receive anything out of these assets till the creditors had been actually paid 20*s.* in the pound. His claim to debentures in respect of that part of composition was consequently disallowed. *Matter of Turquand.* 613, 619 *note.*

R.

RAILWAY COMPANY.

See NEGLIGENCE, 37.

RATIFICATION.

See INFANT, 197, 201 *note.*
INSURANCE, MARINE, 305.
PRINCIPAL AND AGENT, 294.
TRUSTS AND TRUSTEES, 621.
WILLS, 505.

REBUILDING.

See TRUSTS AND TRUSTEES, 789.

RECEIVER.

1. When authorized to carry on business and to pay expenses first from receipts. *Matter of Regent's Canal Ironworks.* 583

REFORMATION OF CONTRACTS.

See MISTAKE, 552, 559 *note.*

REMAINDER.

See WILLS, 568, 770, 779 *note.*

REMAINDERMEN.

See HEIRLOOMS, 737, 738 *note.*
SETTLEMENT, 810.
TRUSTS AND TRUSTEES, 789, 797.

REMOTENESS.

See WILLS, 496, 739.

RENTS.

1. When goes to heir notwithstanding devise on executory limitation. *Wade-Gery* v. *Handley.* 562

RENTS AND PROFITS.

See TRUSTS AND TRUSTEES, 789.

REPAIRS.

See TRUSTS AND TRUSTEES, 789.

REPLEVIN.

See BILLS OF LADING, 189.

RES ADJUDICATA.

See JURISDICTION, 428.

RESCISSION.

See TRUSTS AND TRUSTEES, 621.

RESERVATION.

See MINES, 399.

RESIDENCE.

See DOMICILE, 644, 647 *note.*

REVERSION.

See SETTLEMENT, 810.

REVOCATION.

See WILLS, 459, 461 *note*, 461.

S.

SALE.

1. Wholesale traders supplied goods to a retail dealer on the terms that he was to be allowed a discount of 20 per cent. from the invoice prices on payment in cash within a month:
Held (reversing the decision of the county court judge), that, cash payments not having been made, proof must be admitted in the bankruptcy of the retail dealer for the full amount of the invoice prices of the goods.

2. *Semble*, that a compounding debtor, who allows a creditor to prove without objection at one of the creditors' meetings for a certain sum, cannot afterwards be heard to dispute that that sum is due to the creditor. *Matter of Cumberland.* 841

See VENDOR AND VENDEE.

SALVAGE.

See ADMIRALTY, 483.

SATISFACTION.

See WILLS, 524, 700.

SEAMEN'S WAGES.

See ADMIRALTY, 413, 450.

SECURITY FOR COSTS.

1. The Court of Appeal refused to require an insolvent appellant to give security for the costs of the appeal, where the question at issue had not been previously considered in a court of error. *Rourke* v. *White Moss, etc.* 191

SETTLEMENT.

1. By a settlement reciting a royal warrant directing a sum of £1,000 to be paid to trustees for the benefit of A. D. and J. D. and children of A. D., it was declared that the trustees should stand possessed of the £1,000 upon trusts for investment and payment, and application of the income to or for the benefit of A. D. and J. D. during their respective lives, and from and after the deceases of A. D. and J. D. upon trust to pay, divide, or transfer the £1,000, and all dividends or interest which might be due thereon, unto and amongst all and every the child and children of A. D., and the issue of such child and children, if more than one, in equal shares and proportions, and if but one, then the whole to such one, and to be paid and transferred to such children or child as should be sons or a son at the age of twenty-one years, and to such children or child as should be daughters or a daughter at the age of twenty-one years, or day of marriage, whichever should first happen, the issue of any child or children whose parent or parents should die before his, her, or their share or shares should become payable to be entitled to the share or shares which his, her, or their parent or parents would have been entitled to if living. A son of A. D. attained twenty-one, and died in the lifetime of A. D. leaving a child:
Held, that the child of the son so dying was entitled to the parent's share of the trust fund. *Day* v. *Radcliffe*. 745

2. Covenant in marriage settlement to settle property to which the wife then was or she or her husband in her right should during the coverture become entitled.

3. At the date of the settlement a trust fund stood so limited that on the death of the wife without issue one moiety thereof would belong to her, subject to the life interest therein of her husband, as her share of an intestate's estate:
Held, that the wife's contingent reversionary interest in this fund was bound by the covenant. *Cornwell* v. *Keith*. 810

See APPOINTMENT, 598.
WILLS, 505, 700.

SEWERS.

See MUNICIPAL CORPORATIONS, 375, 379.

SHIPS AND SHIPPING.

See ADMIRALTY.

SHIPS AND VESSELS.

See ADMIRALTY.
CHATTEL MORTGAGE.
PRINCIPAL AND AGENT, 294.

SLANDER.

1. The defendant, an expert in handwriting, had given evidence in the Court of

Probate on the trial of a case called *D.* v. *M.*, in which the genuineness of the signature of the testator to a will was in issue, and had pronounced it as his opinion that the signature was a forgery. The jury found in favor of the will, and the judge of the Court of Probate made some strong observations of an unfavorable nature with regard to the defendant's evidence.

The defendant was afterwards a witness for the defence at a preliminary inquiry before a magistrate into a charge of forgery. The counsel for the prosecution asked him, in cross-examination, whether he had read the remarks made, as above mentioned, by the judge of the Court of Probate, and upon the defendant answering that he had, sat down. The defendant then said he wished to make a statement about the case of *D.* v. *M.* The magistrate said that he could not hear anything about a case not then before the court, and tried to stop him, but the defendant persisted, and said, "I believe that will to be a rank forgery, and shall believe so to the day of my death."

In respect of the words so spoken the plaintiff, who was an attesting witness to the will, brought an action of slander:

Held, that the statement was privileged, and the action would not lie, although the jury found that the words were not spoken by the defendant in good faith as a witness, that he spoke them as a volunteer and for his own purposes, and that he spoke them maliciously, and the court were of opinion that there was evidence to justify these findings. *Seaman* v. *Netherclift*, 176, 183 *note*.

See LIBEL, 332.

SPECIFIC PERFORMANCE.

See COVENANTS, 760, 768 *note*.
FRAUDS, STATUTE OF, 143.
MISTAKE, 820.

STAY.

See FORMER SUIT, 63.

STOCKHOLDERS.

1. After resolutions had been passed and confirmed for the voluntary winding-up of a company, a shareholder, in ignorance thereof, commenced an action against the company and the directors to have his name removed from the register, for a rescission of his contract to take shares, on the ground of misrepresentations in the prospectus, and to obtain repayment of all moneys already paid, and an indemnity against future liability in respect of his shares:

Held, that the relief asked in the action was not inconsistent with the winding-up; and a motion by the voluntary liquidator to stay all further proceedings in the action was refused with costs. *Hall* v. *Old Talargoch Lead, etc.* 794

See CONSIDERATION, 113.
CRIMINAL LAW, 152.
TRUSTS AND TRUSTEES, 797.

STREETS.

See MUNICIPAL CORPORATIONS, 375, 379.

SUBSCRIBING WITNESS.

1. When legacy or estate to, of will, void. *Jull* v. *Jacobs*. 770, 779 *note*.

SUPPORT.

See MINES, 899.

SURETY.

See PRINCIPAL AND SURETY.

T.

TAXATION.

See MUNICIPAL CORPORATIONS, 114, 118 *note*, 341, 348 *note*.

TENANT FOR LIFE.

See LIFE ESTATE.

TENANTS IN COMMON.

See PARTITION.
WILLS, 119.

TITLE.

See BILLS OF LADING, 189.
BONA FIDE PURCHASER, 706, 710 *note*.
INSURANCE, MARINE, 1.
LIFE ESTATE, 510.
WILLS, 568.

TRADE-MARK.

1. The plaintiff, a cigar merchant in London, registered a label at Stationers' Hall, which he requested G., the manufacturer at Havannah who supplied him with cigars of a particular description, to affix to each box consigned to him. G. accordingly affixed the label, with his own name as manufacturer, to all boxes so consigned. The plaintiff subsequently discovered that G. was supplying cigars of the same description, and with the same label, to the defendants, who were G.'s agents, and brought his action to restrain the alleged infringement of his trade-mark. On a motion for an injunction against the defendants:

   Held, that, there being no evidence of any contract that G. should supply the plaintiff exclusively with that description of cigars, the court could not, on an interlocutory application, restrain the defendants from using the label. *Hirsch* v. *Jonas*. 697

2. A word or distinctive combination of letters is not "a distinctive device, mark, or heading" within the meaning of sect. 10 of the Trade Marks Registration Act, 1875 (38 & 39 Vict. c. 91), and cannot be registered as a trade-mark under the act. *Stephens, Matter of*. 749

TRESPASS.

1. When restrained by injunction. *Eardley* v. *Granville*. 859

See BILLS OF LADING, 189.

TROVER.

See BILLS OF LADING, 189.

TRUSTS AND TRUSTEES.

1. One of three joint mortgagees, who were trustees, went abroad, and in his absence the mortgage was paid off; and by a deed, to which he, with the other trustees, was named a party, but which he never executed, the debt and security, except the legal estate outstanding in him, were vested in the transferee of the mortgage. Afterwards a new trustee was by deed appointed a trustee in his place:

   Held, that the neglect or refusal of the old trustee to convey the outstanding legal estate brought the case within the Trustee Acts, and that the court had jurisdiction under those acts to vest in the transferee the outstanding legal estate. *Matter of Walker's Trusts*. 492

2. Purchase-money of part of a settled estate paid in under the Lands Clauses Consolidation Act ordered to be applied towards the cost of lateral additions to a house, part of the settled estate. *Matter of Speer's Trusts*. 503

3. If the trustee of a bankrupt, when called upon to decide whether he will disclaim a continuing contract of the bankrupt, does not disclaim it, but carries it on for the benefit of the estate, he is still at liberty, when he finds it unprofitable, to cease to perform it, and in that case the other party to the contract is entitled, under sect. 31 of the Bankruptcy Act, 1869, to prove against the bankrupt's estate for the damages occasioned by the breach of the contract, and this is his only remedy.

   The trustee does not by not disclaiming adopt the contract, either personally or on behalf of the estate. *Matter of Sneezum*. 621

4. A testator devised certain real estate for life to one of his executors and trustees: the devisee afterwards committed breaches of trust and then filed a petition for liquidation:

Held (affirming the decision of the Vice-Chancellor of the Palatine Court), that, as against the trustee in the liquidation, the life estate of the executor and trustee being legal, could not be taken and applied in replacing losses occasioned by the breaches of trust. *Fox* v. *Buckley*. 641

5. Testator devised real estates in strict settlement, and directed his residuary personalty to be laid out in the purchase of lands to be settled to the same uses. After the date of the will, the testator executed a deed whereby he assigned specific personalty to a large amount to the same persons whom he named as the trustees and executors of his will, upon trusts (not referring to, but) corresponding with, and only in a remote contingency differing from, those of the will.

The mansion house having been pulled down, and requiring to be rebuilt, the tenant for life proposed that, out of the specific personalty fund settled by the deed, £24,000 should be advanced to him to pay for the rebuilding, and that out of the same fund a sum of £40,000 should be set aside, and the dividends accumulated for twenty years, until an amount of £24,000 should be saved, with which the same fund should be recouped:

Held, that the court had jurisdiction to make the order. *Donaldson* v. *Donaldson*. 789

6. Testator bequeathed residuary personalty to trustees, with permission to continue existing investments, upon trust to convert, and invest in, amongst other securities, the stock or shares of any company in Great Britain, and pay the income to a tenant for life, with remainder over. He declared that "the calls, if any, which at or after my decease may be or become due in respect of any shares for the time being constituting part of my residuary personal estate, shall be paid by" the trustees out of income, and not out of capital.

Testator at his death held waterworks and railway shares, upon which some instalments were due, but not yet payable.

After the testator's death the trustees sold some shares on which a call was actually payable, and allowed the brokers to retain the amount of the call out of the sale moneys, for the benefit of the purchaser.

After the testator's death the trustees accepted allotments of valuable shares offered to them in respect of their proprietorship in the company:

Held, that the instalments due on shares accepted by the testator in his lifetime, when payable, and the amount of the call moneys deducted on the occasion of the sale, were calls within the meaning of the will, and hence payable out of income:

7. *Held*, further, that the shares accepted by the trustees did not constitute part of the testator's residuary personal estate at his death, and hence that the calls on such shares were payable out of capital. *Bevan* v. *Waterhouse*. 797

See HEIRLOOMS, 737, 738 *note*.
PARTITION, 724.
WILLS, 568.

U.

USAGE.

See CUSTOM.

V.

VARIANCE.

See AGREEMENT, 232, 238 *note*.

VENDOR AND VENDEE.

See FRAUDS, STATUTE OF.
MISTAKE, 820.
SALE, 841.

VESSELS.

See ADMIRALTY.

VOID LIFE ESTATE.

See WILLS, 770, 779 *note.*

W.

WAGER.

1. H. and B. deposited £50 each with N., and entered into a written agreement that the £100 should be paid to H. if his horse trotted eighteen miles in an hour, and if not, then to B. The referee decided that the horse did trot the distance within the hour. B. demanded his £50 back from N. before the money had been paid over to H.:

Held, affirming the decision of the Common Pleas Division, that B. was entitled to recover his stake back from N., for that the transaction was simply a wager, and did not come within the proviso in 8 & 9 Vict. c. 109, s. 18, as to contributions to a prize, or sum of money to be awarded to the winner of any lawful game, sport, pastime, or exercise. *Batson* v. *Newman.* 202

WAIVER.

See MISTAKE, 820.

WARRANT.

See ARREST, 353, 358 *note.*

WATER AND WATERCOURSES.

1. 14 Geo. 3, c. 96, which was passed for improving the navigation of certain rivers, enacted that "if any person or persons shall wilfully throw any soil .... into any part of the said rivers .... or of any drains, trenches, or watercourses thereunto belonging, every such person shall for every such offence forfeit" a sum of money.

The appellant was a tanner, having premises on a small natural stream at a point about four miles from one of the rivers, into which it flowed at a place where that river was navigable: in the course of his business he discharged refuse from his works into the natural stream: he was convicted by a stipendiary magistrate of an offence against the foregoing enactment:

Held, that the words "drains, trenches, or watercourses thereunto belonging" applied only to artificial streams made for the purpose of improving the navigation of the rivers, and did not apply to natural streams, and therefore that the conviction was wrong.

2. *Held*, also (per Bramwell, B.), that inasmuch as the appellant discharged the refuse in the course of his business, he did not "wilfully" throw it into the stream within the meaning of the statute. *Smith* v. *Barnham.* 383, 387 *note.*

WAY.

1. User for twenty years of a way to a field used only for agricultural purposes does not give a right of way for mineral purposes.

2. The owner of a field, with a right of way to it through an occupation road agreed to sell the surface of the field (reserving the minerals). The field had never been used for mining, and the vendor did not appear to have any present intention of working the minerals:

Held, that the vendor, having had a right to use the road for agricultural purposes only, could not prevent the purchaser from so altering the road as to make it unfit for the use of the vendor in working the minerals under the land agreed to be sold:

3. *Held*, also, that even if the vendor had a right to use the road for minerals, inasmuch as he had no present intention of working the minerals, the court would not interfere.

4. *Quære*, per Mellish, L.J., whether, where an occupation road follows the boundary of two estates so as to afford a presumption of ownership *ad medium filum*, each owner has not the right to use the road for all purposes though the actual user has been only for limited purposes. *Morris* v. *Bradburn.* 847

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WILLS.

1. A testator, by will of April, 1811, devised certain hereditaments to his granddaughter E. C. and her heirs. But if E. C. died without leaving lawful issue living at her death, the testator devised the hereditaments "unto and to the use of the nine children of J. A., to be equally divided among them share and share alike." And he devised all the residue of his estate to his son P. C.

E. C. died, leaving no issue living at her death. One of the nine children of J. A. survived E. C.:

Held, 1st, that the executory devise over to the children of J. A., being before the Wills Act, created in them a tenancy in common for life only; and, 2dly, that this executory devise affected the previous estate in fee given to E. C. to the extent of such life estates only, and that subject to the life estates the property remained in E. C. and her heirs. *Gatenby* v. *Morgan*. 119

2. The deceased, having duly executed his will, married, and subsequently executed another will in favor of his wife and children. In this last will, in case there were no child or children of the marriage living at the death of his wife, he revived and brought into force again his former will, and directed that its provisions and directions should be complied with as though they formed part of his last will. At the time of his death there were living a widow and one child:

Held, that the first will should be included in the probate. *Matter of Bangham*. 459, 461 *note*.

3. The testator having duly executed a will, subsequently married. On the day of and after the marriage ceremony he executed a codicil, by which he made a provision for his wife, and in all other respects revived, ratified, and confirmed his will. His wife predeceased him, and on his death the codicil, which had been in his possession, could not be found. Declarations of the testator of a desire to adhere to his will were proved extending up to the latest period of his life:

Held, that the testator could not have intended by the destruction of the codicil to render his will inoperative, and that the court would therefore grant probate of the will and of the codicil as contained in a draft from which the original was prepared for execution. *James* v. *Shrimpton*. 461

4. The witnesses to the execution of a codicil signed their names on the back of a will, to which that codicil was attached by a pin. There was evidence which satisfied the court that the will and codicil were pinned together at the time of the execution of the codicil, and that the witnesses intended by their subscription on the back of the will to attest the signature of the testatrix at the foot of the codicil:

Held, that the codicil was entitled to probate. *Matter of Braddock*. 463

5. A testator gave to A. B. an annuity of £50 per annum for her life, and after her decease to the children she might have, born in wedlock, equally to be divided between them during their lives, and after the decease of the survivor to go to his nephew and his two nieces equally between them. A. B. having died without issue:

Held, that the gift to the nephew and nieces was not void for remoteness, and that they took the capital from whence the annuity proceeded absolutely, in equal shares as tenants in common. *Evans* v. *Walker*. 496

6. Where a settlement, incomplete as to part of the property comprised in it, is subsequently confirmed by the will of the settlor, the confirmation perfects the settlement, but as a testamentary instrument, so that the doctrines of ademption and lapse apply.

7. R. H., by a voluntary settlement, assigned to trustees several mortgage debts, certain shares in a bank, and some furniture, and directed the trustees to hold the premises and certain consols which had been previously transferred to them, upon trust for herself for life, and then, as to part of the trust premises, for specified beneficiaries; and as to the residue, for M. F.

M. F. died in the lifetime of the settlor, who in her lifetime received some

of the mortgaged debts (the others being received by the trustees), and died without having duly transferred the bank shares, but having by her will confirmed the settlement. The settlement being valid as to the consols, the mortgage debts received by the trustees, and the furniture, but incomplete as to the mortgage debts received by the settlor, and the bank shares:

Held, that the confirmation could not operate as to the mortgage debts received by the settlor; but that, notwithstanding that the settlement had not been admitted to probate, the confirmation of it by the will, which had been proved, perfected the settlement with regard to the bank shares as a testamentary instrument, and operated as a specific bequest of them; and that the shares therein of *cestuis que trust* under the settlement, who predeceased the settlor, lapsed in favor of the residuary legatee under this will. *Bizzey* v. *Flight*. 505

8. Testatrix, who died in November, 1874, by her will in January, 1874, bequeathed to each of the three children of her niece £1,000; and if any of the said three children should die before attaining the age of twenty-one years, the legacy was to be divided between the survivors of the said three children. There was a codicil in June, 1874, confirming, as regarded this bequest, the will. At the date of the will the niece had three children living, the youngest being three years old, and a fourth child *en ventre sa mère* at the time, and born in July, 1874, claimed a legacy of £1,000:

Held, that the three children born at the date of the will only were entitled to legacies. *Jones* v. *Emery*. 516

9. Testator bequeathed all his household furniture which should be in his capital messuage at his death, unto trustees upon trust to permit the same to be held and enjoyed as heirlooms with his said messuage by the person entitled to the same messuage under the will. The testator, who died in 1875, was, in 1874, the occupier of a house at Bath, which he had furnished. He ceased to occupy that house in 1874, and removed the furniture with the intention of its being placed in his capital messuage, which was in the occupation of a tenant. The tenant having declined to permit the furniture to be placed therein, it was, in consequence of such refusal, stored in farm buildings belonging to the testator, where it was at his death:

Held, that the furniture passed under the bequest. *Rawlinson* v. *Rawlinson*. 518

10. A gift by will by a testator to his wife of "all my personal property, all sums of money which I may possess or may be owing to me at the time of my decease, together with all the furniture, farming implements," and other things in the family mansion, is not specific.

11. A testator who had two sums of £1,000 and £500 in his hands upon trust for his sisters E. and A. respectively for life, for their separate use, and after their deaths for their children equally, by his will desired that his real estate should be sold, and that two sums of £1,000 and £500 should be paid to his sisters out of the proceeds of sale, and desired that the remainder of the proceeds of sale might be equally divided amongst other persons named:

Held, that the gifts to the sisters were not a satisfaction of the moneys held by testator as trustee for his sisters and their children. *Fairer* v. *Park*. 524

12. A testator directed that a fund of personalty over which he had a general power of appointment should, unless otherwise specifically disposed of by a codicil, become part of his residuary estate. By a codicil he gave out of this fund various charitable legacies, and directed that the residue of the fund should be given by his executors to the charitable institutions to which he should by any future codicil give the same, "and in default of any such gift, then to be distributed by my executors at their discretion." He made no subsequent codicil:

Held (affirming the decision of Hall, V.C.), that the ultimate trust in the codicil was that the residue should be distributed by the executors among charitable institutions at their discretion, and that a trust in favor of charity was created. *Pocock* v. *Attorney-General*. 544

13. A testator devised a moiety of his real estate to A. and B. and their heirs,

to the uses and upon and for the trusts and purposes thereinafter mentioned, namely, to the use of A. and B., their executors, administrators, and assigns, for 120 years, if S. C., the wife of J. C., should so long live, and subject thereto, to the use of J. C. for life, with remainder to A. and B. and their heirs during his life, upon trust to preserve contingent remainders, with remainder to the use of all the children of J. C. and S. C. who should be living at the decease of the survivor of them, and the issue then living of such of the children as should be then dead, and the respective heirs and assigns of such children and issue as tenants in common (the issue taking only their parent's share), with divers remainders over. The will contained a power authorizing A. and B. and the survivor of them, and the heirs and assigns of such survivor, to "convey in exchange" any parts of the property, and to "convey upon partition" any of testator's undivided shares, with a direction that for those purposes it should be lawful for them by deed to revoke the uses, estates, trusts, and limitations of the property in shares so exchanged or conveyed in partition, and by the same or any other deed to "grant and convey" them to the requisite uses, "or for the purposes aforesaid to limit, appoint, or declare such use or uses," &c., as should be necessary. J. C. died in the lifetime of S. C.:

Held (affirming the decision of the Master of the Rolls), that the intention of the testator clearly was to create a succession of legal limitations in settlement, and that the court could not hold the legal fee to be in A. and B. merely because if it was not in them the contingent remainder to the children had in the events which had happened failed for want of an estate of freehold to support it. *Cunliffe* v. *Brancker*. 568

14. Personal property settled on the marriage of C. W. in trust as she should during coverture by deed or will appoint, and, subject thereto, for her separate use for life, and if she survived her husband (which happened) for her absolutely:

Held, to be bound by her general engagements.

15. Accordingly, C. W. having in a settlement on the marriage of her daughter L. covenanted with the trustees thereof for the payment to them on her decease of £1,000 to be in trust for L. for life, then for the husband of L. for life, then upon the usual trusts for her children:

Held, that the trustees of L.'s settlement were entitled, on the death of C. W., to stand in the position of creditors in respect of the property comprised in the first settlement.

16. By the will of C. W. executed under the power of the first settlement, £1,000 was settled upon trusts similar to those of plaintiff's settlement, omitting the husband's life interest:

Held, that this was a case of satisfaction, and that neither L. nor her children took anything additional under the will unless L.'s husband survived her:

17. *Held*, also, that dividends received by C. W. after her husband's death, and railway stock representing part of her settled property which was realized after her husband's death, did not pass under her testamentary appointment. *Mayd* v. *Field*. 700

18. A testator gave his real and personal estate to trustees upon trust for his wife during widowhood, and after her death or second marriage for his children who might be living at such death or second marriage, and the issue of any child who might have previously died, such issue to take the share of her or his deceased parent in equal shares, the shares of such of his children or grandchildren as should be a son or sons to become vested in and payable to them as and when he or they should respectively attain the age of twenty-four years, and the shares of his daughters, or the female issue of any deceased child, to be settled as therein mentioned:

Held, that the whole of the gifts after the life interest of the widow were void for remoteness. *Hale* v. *Hale*. 789

19. The primary meaning of the word "family" in a will is "children."

20. A testator directed the interest arising from all his real and personal property to be paid to his wife during her life, and after her decease to be equally divided amongst all his family that should be then living when they

should attain the age of twenty-one years. At the date of his will he had seven children living, some over and others under twenty-one, and some married, with children:

Held, that under the word "family" children alone could take. *Pigg* v. *Clark*. 754

21. A testator, after disposing specifically of most of his property, enumerated certain funds out of which he directed that his debts, funeral and testamentary expenses, should be paid, and added: "The remainder to be equally divided to my surviving children." The frame of the will left it doubtful whether these words were intended to apply generally or only to the residue of the particular funds:

Held, that, considering the general frame of the will, only what was left of the particular funds passed.

22. Gift to the testator's daughter of real and personal estate "during her lifetime, and after her decease the property to be equally divided between her children on their becoming of age":

Held, that, as regarded the real estate, the gift to the children was strictly a remainder, and that the construction as to the personalty followed the same rule as the realty; and, therefore, that, the gift to the daughter being void on account of her having attested the will, the gift to the children was accelerated, and took effect immediately:

23. *Held*, also, that the remainder to the daughter's children created vested interests. *Jull* v. *Jacobs*. 770, 779 *note*.

24. At the death of a testator two copies of his will were produced, one of which had been retained by himself, the other deposited with his bankers; each with a codicil containing the same gift in the same words, but of different dates, and attested by different witnesses. Probate having been granted of the duplicate will and of the two codicils:

Held, that evidence by one of the attesting witnesses to one of the codicils was admissible for the purpose of showing, from the circumstances attending the execution, that the two codicils were not two but one instrument, and accordingly that the legatee therein named was entitled to one legacy only. *Hubbard* v. *Alexander*. 786

25. Testator devised and bequeathed the residue of his real and personal estate upon trust to convert his residuary personal estate, "except leaseholds," and out of the income of the investments and the rents and profits of the real estate to pay certain annuities, and accumulate the residue of the income during his wife's life; and after her death upon trust as to all his "real estate" at, in, or near E., and in or near W., out of the rents and profits during the life of J. T. W. to repair and insure, and to pay an annuity, and subject thereto in trust for J. T. W. and his assigns for life, and after his decease for his first and other sons successively in tail male, with remainder to his daughters equally as tenants in common in tail, with limitations over in the nature of cross remainders.

Testator had both freeholds and leaseholds for a term of 1,000 years at E.; at W. he had leaseholds only, for a term of 900 years:

Held, that the leaseholds at E. and also at W. passed under the above devise, the exception of leaseholds in the gift of residue not showing a contrary intention. *Moase* v. *White*. 806

26. A bequest in favor of a woman's illegitimate child *en ventre sa mère* at the date of the will though not born until after the testator's death, is not contrary to public policy.

27. A testator, whose daughter M. had with his knowledge gone through the ceremony of marriage with J. C., her deceased sister's husband, and had had two children by him, made his will at a time when he knew she was again *enceinte*. He thereby gave leaseholds to trustees on trust for "my daughter M., the wife of J. C.," for her life, with remainder to "the child or children of my said daughter M. C." as she should appoint, and in default for her child or children equally, and if none, then over. The testator died three months before the third child was born. M. appointed to the two children born at the date of the will, the child of which she was then *enceinte*, and a fourth child begotten and born after the testator's death.

The House of Lords having decided that the two children born at the date of the will were sufficiently designated, and that they took under the gift in the will:

Held, that the child *en ventre sa mère* at the date of the will also took under the gift, but that the child begotten and born after the testator's death could not take. *Crook* v. *Hill.* 815

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